TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 61

JOHN H. CRUMADY, PETITIONER,

vs.

"JOACHIM HENDRIK FISSER", HER ENGINES, TACKLE, APPAREL, ETC., JOACHIM HENDRIK FISSER, ET AL.

No. 62

"JOACHIM HENDRIK FISSER", HER ENGINES, TACKLE, APPAREL, ETC., PETITIONER,

vs.

NACIREMA OPERATING CO., INC.

ON WRITS OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 61, PETITION FOR CERTIORARI FILED APRIL 30, 1958
NO. 62, PETITION FOR CERTIORARI FILED MAY 1, 1958
CERTIORARI GRANTED JUNE 9, 1958

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INDEX

APPELLANT'S APPENDIX—FILED FEBRUARY 28, 1957

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JOHN H. CRUMADY, Appellant,

v.

JOACHIM HENDRIK FISSER, Her Engines, Tackle, Apparel, etc., and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER, Respondent.

NACIREMA OPERATING CO., INC., Impleaded Respondent.

RELEVANT DOCKET ENTRIES

1- 4-54	Libel and complaint filed.
1- 4-54	$250.00 deposited in Registry.
1- 4-54	Clerk's Certificate redeposit in registry filed.
1- 4-54	Monition issued returnable 2-8-54.
1- 4-54	Notice of Allocation filed (Newark).
1- 6-54	Value Bond filed 1-5-54.
1- 6-54	Clerk's Order of Release of Vessel filed 1-5-54.
1- 6-54	Claim of Owner filed 1-5-54.
1- 7-54	Monition returned executed filed 1-6-54.
1- 7-54	Copy of order of release with Marshal's return thereon filed 1-6-54.
2- 8-54	Answer of Hendrik Fisser Aktien Gesellschaft, claimant filed 2-5-54.
2- 8-54	Stipulation for unpleaded petitioner's costs filed 2-5-54.

2- 8-54 Petition to implead Nacerema Operating Co., Inc., filed 2-5-54.

2- 8-54 Citation to impleaded respondent issued.

2-16-54 Citation to impleaded respondent returned executed filed 2-15-54.

3-12-54 Stipulation extending time of impleaded respondent to answer to 3-15-54 filed.

3-16-54 Answer of Nacerema Operating Co. filed.

3-16-54 Stipulation for costs of impleaded respondent filed.

[fol. 2]

7-13-54 Order of re-assignment, filed (Forman) Notice mailed.

9-26-55 Pre-Trial Conference. Ordered leave granted to respondent—impleaded to amend answer. (Wortendyke) 9-22-55.

9-28-55 Transcript of Pre-trial Conference, filed.

9-30-55 Deposition of Libellant filed 9-29-55.

10-28-55 Ordered trial adjourned preemptorily (sic) to Feb. 23, 1956.
Order to be submitted (Wortendyke) (10-27-55)

11- 4-55 Order fixing trial date peremptorily for Feb. 23, 1955 filed 11-3-55 (Wortendyke) Notice mailed.

1-19-56 Respondent-Impleaded's Interrogatories filed.

1-26-56 Order to show cause re: Interrogatories, filed 1-25-56 (Wortendyke) (ret. 1-30-56).

1-31-56 Notice of motion by claimant to require libellant and respondent-impleaded to produce and permit the inspection and testing of certain articles, and acknowledgment of service, filed (ret. 2-14-56) (no brief submitted).

2- 1-56 Hearing on motion to take depositions abroad. Decision reserved. (Wortendyke) (1-31-56)

2- 3-56 Letter-opinion granting motion re interogatories (sic) to be answered abroad filed 2-1-56.

2- 8-56 Consent order for Commission to take testimony filed 2-7-56 (Wortendyke) Notice mailed.

2-10-56 Notice of motion by respondent-impleaded to strike the impleaded petition of the respondent for failure to answer interrogatories; and for the inspection, etc. of the log and affidavit of service, filed (ret. 2-14-56) (No brief submitted).

[fol. 3]

2-15-56 Claimant's motion to require libellant and respondent-impleaded to produce and permit the inspection and testing of certain articles withdrawn (Wortendyke) (2-14-56).

2-15-56 Proclamation made of respondent-impleaded's motion to strike impleading petition of respondent for inspection, etc., of log. Consent order submitted (Wortendyke) (2-14-56).

2-15-56 Consent Order directing respondent to answer interrogatories; to permit respondent-impleaded to examine and copy certain portions of log filed 2-14-56 (Wortendyke).

2-28-56 Depositors of Karl Heinrichsdorff and August Otto before Vice Consul at Bremen, Germany, filed 2-25-56.

2-29-56 Order directing Clerk to deliver depositions taken in Germany to Counsel for claimant or impleaded-respondent, etc., filed 2-28-56 (Wortendyke).

3- 5-56 Trial without Jury before Hon. Regnier J. Wortendyke, Jr. (3-1-56). Trial adjourned to 3-2-56.

3- 5-56 Claimant's answers to interrogatories, filed 3-2-56.

3- 5-56 Trial continued (3-2-56).
Trial adjourned to 3-5-56.

3- 6-56 Trial continued (3-5-56).
Trial adjourned to 3-6-56.

3- 7-56 Trial continued (3-6-56).
Trial adjourned to 3-7-56.

3- 8-56 Trial continued (3-7-56).
Trial adjourned to 3-9-56.

3-12-56 Trial continued (3-9-56).
Trial adjourned to 3-13-56.

[fol. 4]

3-14-56 Trial continued (3-13-56).
Trial adjourned to 3-14-56.

3-15-56 Trial continued (3-14-56).
Trial adjourned to 3-15-56.

3-16-56 Trial continued (3-15-56).
Trial adjourned to 3-16-56.

3-20-56 Trial continued (3-16-56).
Trial adjourned to 3-26-56.

3-27-56 Trial continued (3-26-56).
Trial adjourned to 3-29-56.

4- 2-56 Trial continued (3-29-56).
Trial adjourned to 4-5-56.

4-10-56 Trial continued (4-6-56).
Trial adjourned to 4-10-56.

4-11-56 Trial continued (4-10-56).
Hearing on motion to dismiss as to impleaded respondent. Decision Reserved.
Trial adjourned to 4-11-56.

4-12-56 Trial continued (4-11-56).
Trial adjourned to 4-12-56.

4-13-56 Trial continued (4-12-56).
Trial adjourned to 4-13-56.

5-18-56 Ordered April 12, 1956 minutes amended as follows: Decision Reserved. Findings of Facts and conclusions of law to be submitted.

6- 6-56 Deposition of John Joseph Smith filed 6-5-56.

6-27-56 Opinion filed (Wortendyke) (In favor of Libellant).

8- 3-56 Notice for settlement of Decree with affidavit of service filed (ret. 8-8-56).

8- 9-56 Hearing on notice for settlement of decree. Order to be submitted (Wortendyke) (8-8-56).

[fol. 5]

8-17-56 Hearing on respondent's application for allowance of counsel fees. Ordered application denied (Wortendyke) (8-15-56).

8-17-56 Ordered stenographer's costs be taxed by Clerk (Wortendyke) (8-15-56).

8-17-56 Decree for judgment for $55,527.15 with costs (including $614.41 paid by libellant to court reporter), in favor of John H. Crumady, libellant, and against respondent, Joachim Hendrik Fisser, her engines, tackle, apparel, etc., and claimant, Hendrik Fisser Aktien Gesselschaft; and judgment for $55,527.15 and such interest as is paid thereon and libellant's taxed costs, with costs (including $614.41 paid by claimant to court reporter) in favor of Hendrik Fisser Aktien Gesselschaft, claimant, and against Nacerema Operating Co., Inc., respondent-impleaded filed 8-15-56 (Wortendyke).

8-24-56 Verified Bill of Costs and Notice to tax returnable 8-29-56 and affidavit of service filed.

8-29-56 Notice of taxation of costs and libellant's bill of costs filed 8-28-56 (ret. 8-29-56).

8-30-56 Hearing on application to modify final decree as to allowances for costs of trial transcript. Ordered application denied (Wortendyke) (8-29-56).

8-30-56 Claimant's Taxation of Costs in the sum of $2240.96 filed.

8-30-56 Libellant's Taxation of Costs in the sum of $903.52 filed.

10- 5-56 Transcript of Trial filed 10-4-56 (4 volumes).

11-15-56 Notice of Appeal filed 11-13-56.

11-15-56 Appeal bond filed 11-13-56.

11-15-56 Notice of Cross-Appeal by Claimant filed 11-13-56

[fol. 6]

11-15-56 Copies of notice of appeal mailed to Brass & Brass, Esqs., Charles N. Fiddler, Esq., and Clerk, U. S. C. A.

11-15-56 Copies of notice of cross-appeal mailed to Brass & Brass, Esqs., Stryker, Tams & Horner, Esqs., and Clerk, U. S. C. A.

11-16-56 Notice of cross appeal by libellant filed.

11-16-56 Copies mailed to Charles N. Fiddler, Esq., Stryker, Tams & Horner, Esqs. and Clerk, U. S. C. A.

11-23-56 Consent order for release of certain exhibits temporarily, filed 11-20-56 (Wortendyke).

12- 3-56 Petition and order extending time of libellant for for (sic) filing. Notice of Appeal, filed. (Wortendyke) Notice mailed.

12- 3-56 Order extending time to file record on appeal and to docket action filed. (Wortendyke) Notice mailed. Copies mailed U.S.C.A.

12- 6-56 Notice of Appeal filed.

12- 6-56 Copies of notice of appeal sent to Charles N. Fiddler, Esq., Stryker, Tams & Horner, Esqs., and U.S.C.A.

12-11-56 Order extending time to transmit record on appeal to 1-8-57 and to docket action to 1-18-57 filed. (Wortendyke) (Copy mailed to U.S.C.A.)

12-14-56 Partial transcript of trial filed 12-13-56.

1- 7-57 Record on Appeal sent to U.S.C.A.

[fol. 7]

IN UNITED STATES DISTRICT COURT

LIBEL OF INFORMATION—Filed January 4, 1954

The libel of the complaint of John H. Crumady, residing at number 146 South 9th Street, in the City of Newark, County of Essex and State of New Jersey, a citizen of the United States of America, in a cause of action for damages, civil and maritime, for injuries sustained against the ship, "JOACHIM HENDRIK FISSER", her engines, tackle, apparel, etc. and against Joachim Hendrik Fisser and/or Hendrik Fisser, claimants and respondents and against all of the persons intervening in their interests therein in a cause of action for damages, civil and maritime, alleges as follows:

First: That on or about the 2nd day of January, 1954, Joachim Hendrik Fisser and/or Hendrik Fisser was the registered owner of the aforesaid ship known then as "JOAKIN HENDRIK FISSER", and said owner or owners are owners and residents of Emden, Germany.

Second: Your libellant not being certain as to who is actually the owner of said ship, therefore sues Joachim Hendrik Fisser and Hendrik Fisser, jointly and severally, and leaves it to this court to determine who is actually liable for any and all damages sustained by this libellant by reason of the injuries caused to him by the negligence hereinafter complained of.

Third: That on January 2, 1954, the claimants and respondents held out an invitation to this libellant to board the said ship and to work thereon for the purpose of assisting other longshoremen, likewise invited and engaged, in the removal of a cargo of lumber therefrom while said ship was lying in navigable waters known as Newark Bay, adjacent to the State of New Jersey, in the United States of America, and said ship was moored to the pier on the south side of Port Newark, County of Essex and State of New Jersey.

[fol. 8] Fourth: On the 2nd day of January 1953, the libellant was in the employ of Turner & Blanchard, Inc. and/or Nacirema Stevedoring Co., both corporations being engaged in the stevedoring business and engaged on said date in the transferring of a cargo of lumber from said ship to the pier at which it was moored with the knowledge and consent of claimants and respondents, for their benefit, gain or profit and for the purposes for which said ship was at said pier.

Fifth: On said date, the libellant was lawfully in the forward hold on deck of said ship, duly engaged in his employment in and about the loading and transfer of the cargo, and was not a member of the crew of said ship, but was an invitee thereon, having accepted the invitation of the claimants and respondents to board the said ship and to work as aforesaid thereon which invitation was extended to libellant by the claimants and respondents through their duly authorized agents, servants or employees.

Sixth: On said 2nd day of January, 1954, while libellant was employed as aforesaid, the claimants and respondents and/or by their agents, servants or employees, negligently, carelessly and recklessly caused, allowed and permitted a boom to drop and fall upon and against the libellant severely and permanently injuring him as hereinafter set forth.

Seventh: The said accident and the said injuries were caused without any fault or negligence on the part of the libellant, but solely through the fault, carelessness and negligence of the claimants and respondents, jointly or severally, and their agents, servants or employees.

Eighth: The said claimants and respondents were negligent, careless and reckless in that they failed to provide sufficient and proper equipment and machinery; in that said machinery and equipment were defective, out of repair, inadequate, insufficient and unsuited for the purpose [fol. 9] of handling the cargo; in that the cable and wiring forming a part of the said equipment were worn, frayed and damaged, and were used with the knowledge of that fact; in that the claimants and respondents failed and

neglected to inform or notify libellant of the hazardous and dangerous condition of the said equipment and of the hazardous and dangerous condition of the employment on the said ship at the time of the accident; in that the claimants and respondents allowed and permitted incompetent help and superintendents to operate and direct the boom and equipment on said ship; in that said claimants and respondents themselves or through their agents, servants or employees gave libellant no warning of any kind so as to permit him an opportunity to get out of the way of said broken and defective boom and equipment; that the equipment attached to said boom and a part thereof was insufficient, defective, inadequate and unsuited to handle the transfer of said cargo; and said claimants and respondents were in devious other ways negligent, careless and reckless.

Ninth: As the result of all of which as aforesaid, libellant sustained compound comminuted fractures of his left tibia and fibula, multiple communited (sic) fractures of his pelvic bone, multiple fractures of the transverse processes of his spine, separation of the symphysis pubis, severe shock, injury to internal organs, still undetermined and injury to other portions of his body, all of which have caused and will in the future cause extreme pain and suffering and will result in permanent injury, and libellant will be compelled to undergo treatment and surgical operations.

Tenth: By reason of the injuries caused as aforesaid, libellant will be compelled to expend large sums of money for hospital confinement, physicians services, nurses, medicines, X-rays, and other medical care and attention, and he will be incapacitated from following his usual occupation and performing his usual duties thereby suffering the loss [fol. 10] of wages and earnings and resulting in great monetary damage.

Eleventh: That at all times herein mentioned Joachim Hendrik Fisser and Hendrik Fisser or either of them operated said ship, "Joachim Hendrik Fisser" through their agents, servants or employees.

Twelfth: That the said Joachim Hendrik Fisser is a merchant vessel and is now or will be during the issuance of process within the territorial jurisdiction of the United States and of this Court.

Thirteenth: That all and singular, the premises of the foregoing libel are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the ship, Joachim Hendrik Fisser, her tackle, engines, apparel, etc., and that all persons claiming any right, title or interest therein may be cited to appear and answer, all and singular, the matters aforesaid, and that this Honorable Court may be pleased to decree payment by the claimants or either of them to the libellant, aforesaid, in the sum of $200,000.00 with interest and costs or in any amount that may be just and proper and that the said ship may be condemned and sold to pay the same and that libellant may have such other further relief and redress as in law and justice he may be entitled to receive and the Court is competent to give in the premises.

Brass & Brass, Proctors for Libellant, By Sidney A. Brass, a member of the firm.

[fol. 11] *Duly sworn to by John H. Crumady, jurat omitted in printing.*

[fol. 12]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 5, 1954

The claimant, Hendrik Fisser Aktien Gesellschaft, answering the libel by its proctor, Charles N. Fiddler, alleges upon information and belief as follows:

First: It admits that on or about January 2, 1954, it was the owner of the S.S. Joachim Hendrik Fisser and was

a resident of Emden, Germany. It denies all the other matters contained in Article numbered First of the libel.

Second: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters contained in Article numbered Second of the libel.

Third: It admits that prior to January 2, 1954, it entered into a contract with Nacirema Operating Co., Inc., under which it engaged Nacirema Operating Co., Inc., to discharge a cargo of lumber from the S.S. Joachim Hendrik Fisser, and that upon information and belief, on January 2, 1954, the libellant, together with other longshoremen, as agents, servants and/or employees of Nacirema Operating Co., Inc., came aboard the S.S. Joachim Hendrik Fisser pursuant to the terms of this contract to discharge a cargo of lumber from this vessel, which at the time was lying in navigable waters known as Newark Bay, adjacent to the State of New Jersey in the United States of America, and was moored to the pier on the south side of Port Newark, County of Essex, and State of New Jersey. It denies all the other matters contained in Article numbered Third of the libel.

Fourth: It admits upon information and belief that on January 2, 1954, the libellant was in the employ of Nacirema Operating Co., Inc., a corporation engaged in the stevedoring business, which on said date, pursuant to the terms of the contract aforementioned, was engaged in transferring a cargo of lumber from the S.S. Joachim Hendrik Fisser to [fol. 13] the pier at which it was moored. It denies that it has any knowledge or information thereof sufficient to form a belief as to all the other matters contained in Article numbered Fourth of the libel.

Fifth: It admits upon information and belief that on January 2, 1954, libellant was in the forward hatch of said vessel and was not a member of the crew of said ship, but was an agent, servant or employee of Nacirema Operating Co., Inc., which had been engaged, pursuant to contract, to discharge a cargo of lumber from the S.S. Joachim Hendrik Fisser. It denies that it has any knowledge or infor-

mation thereof sufficient to form a belief as to all the other matters contained in Article numbered Fifth of the libel.

Sixth: It denies all the matters contained in Article numbered Sixth of the libel.

Seventh: It denies all the matters contained in Article numbered Seventh of the libel.

Eighth: It denies all the matters contained in Article numbered Eighth of the libel.

Ninth: It denies all the matters contained in Article numbered Ninth of the libel.

Tenth: It denies all the matters contained in Article numbered Tenth of the libel.

Eleventh: It admits that at the times mentioned in the libel, it operated the S.S. Joachim Hendrik Fisser, but not those parts thereof and the machinery, appliances and equipment thereon which were being operated by, and were under the control of, the libellant, his fellow employees, superiors, and Nacirema Operating Co., Inc., its agents, servants and/or employees. It denies all the other matters contained in Article number Eleventh of the libel.

Twelfth: It admits that the S.S. Joachim Hendrik Fisser is a merchant vessel and that at the time of the filing of the [fol. 14] libel herein, it was within the territorial jurisdiction of the United States and of this Honorable Court.

Thirteenth: It denies that it has any knowledge or information thereof sufficient to form a belief as to whether all and singular the premises of the libel are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. It denies all the other matters contained in Article numbered Thirteenth of the libel.

As a First, Separate and Complete Defense

Fourteenth: That if the libellant received any injuries as alleged in the libel, said injuries were caused in whole or in part by libellant's own negligence, and were not caused or contributed to in any manner by any negligence of the claimant.

As a Second, Separate and Complete Defense

Fifteenth: That the injuries to the libellant, if any, arose out of certain risks, dangers and hazards, all of which were open, obvious and well-known to the libellant at and before the said injury, and all of said risks, dangers and hazards had been assumed by the libellant.

Wherefore, claimant demands that the libel be dismissed with costs to the claimant as against the libellant, and for such other, further and different relief as the justice of the cause may require.

Charles N. Fiddler, Proctor for Claimant, 2 Edgewood Place, Maplewood, New Jersey.

[fol. 15] State of New York,
County of New York, *ss.*:

Charles N. Fiddler, being duly sworn, deposes and says:

I am an attorney at law, proctor for Hendrik Fisser Aktien Gesellschaft, claimant herein. I have read and know the contents of said answer, and the same are true to the best of my knowledge, information and belief.

The reason why this verification is made by me and not by said claimant is that said claimant is a foreign corporation, whose officers are not within the county where your deponent has his office.

The sources of my information and the grounds for my belief are statements and information supplied by agents of said claimant.

Charles N. Fiddler

Sworn to before me this 4th day of February, 1954.

(Seal)

Theodore P. Daly, Notary Public, State of New York, No. 24-0850750, Qualified in Kings County, Certificates filed with Kings and N. Y. County Clerks and Registers Offices, Term Expires March 30, 1955.

[fol. 16]

IN UNITED STATES DISTRICT COURT

OPINION—Filed June 27, 1956

Wortendyke, *J.*:

This admiralty suit was instituted by libel in rem for damages, civil and maritime, for bodily injuries and their consequences, resulting from the fall of a cargo boom serving hatch No. 1 on the motor vessel Joachim Hendrik Fisser, of German registry, while lying in navigable waters of the United States, within the jurisdiction of this Court, at a pier or bulkhead at Port Newark, New Jersey, on January 2, 1954.

The vessel impleaded as a respondent libellant's employer, Nacirema Operating Co., Inc. (herein called Nacirema), the stevedore contractor which was discharging the vessel's cargo at the time of the occurrence complained of.

The injuries were inflicted during the course of discharge of a cargo of lumber and timbers from the forward (No. 1) hatch of the vessel by libellant's fellow-employees. The discharging operations had commenced about an hour before the offending occurrence, during which time certain drafts of lumber had been discharged by means of the so-called "up-and-down" boom and Burton boom from the hatch of the vessel to the pier. The booms and tackle had been initially rigged by the ship's crew but before the operation in the course of which libellant was injured the stevedores had altered the position of the head of the up-and-down boom and the places of fastening of its guy and preventer. The discharging instrumentalities, including the winches, were being handled by libellant and his fellow-employees.

When the accident occurred the stevedores were in the course of discharging from the hatch two timbers, lying fore and aft of the hatch, estimated in dimensions at from [fol. 17] 8" × 8" to 12" × 12" in girth and from 30 to 37 feet in length. One of these two timbers lay upon the cargo within the open square of the hatch, while the other timber lay beneath and entirely or partly outboard of the outboard-

curving lower edge of the starboard hatch coaming, the top surface of the latter timber being close to the edge of the coaming and beneath the deck. In an effort to bring the two timbers together and into the open area of the hatch square, libellant and his fellow employees had placed a double-eyed wire rope sling, provided with a sliding hook movable between the eyes thereof, around the two timbers at a location two or three feet from their after ends. The two eyes of the sling were then placed upon the cargo hook of the up-and-down boom runner and a signal given by the stevedore gangwayman to the winchman to "take up the slack". The winchman complied with the signal, and during this operation libellant stood clear upon other timbers forming a part of the cargo, within the open square of the hatch. There was some testimony that when the slack was taken up by the winchman, the two timbers slid toward each other in the sling, the timber which had been under the lower edge of the hatch coaming moving or commencing to move toward the timber which lay within the open hatch square. After the slack had been taken up by the winchman, the same signaller called for the "taking of a strain" upon the cargo runner. The winchman again responded, the two-post topping-lift broke and the head of the up-and-down boom, with its attached cargo and topping-lift blocks, fell to the top of the cargo within the hatch square.

The topping-lift had been rigged in a double purchase and had been supporting the head of the boom. The wire rope constituting the topping-lift extended from a shackle on the topping-lift block at the cross-tree of the mast, through a block at the boom head, back through the mast block, down the mast, through a block welded to the mast table, and thence around a drum of the winch. When the boom fell, libellant was knocked down, either by the [fol. 18] boom itself or its appurtenant tackle, and thus sustained numerous serious and permanent disabling orthopedic and neurological injuries.

Alleging that he was impliedly invited by the vessel and her owner to participate in her unloading, libellant charges that his injuries proximately resulted from the negligence of such owner, its agents and servants, and from the unseaworthiness of the vessel. More particularly,

libellant asserts that the topping-lift which parted and permitted the boom to fall was, to the knowledge of the vessel's owner, "worn, frayed and damaged", and that "the equipment attached to * * * the boom * * * was insufficient, defective, inadequate and unsuited to handle the transfer of said cargo."

Libellant's employer is impleaded as a respondent upon the vessel's contention that the sole cause of the breaking of the topping-lift, and the consequent fall of the boom, was the active negligence or improper conduct of the libellant's fellow employees in the handling of the cargo and unloading gear. By reason thereof the vessel seeks indemnification under the 56th Admiralty Rule.

At the commencement of the trial, the following facts were stipulated: (1) the topping-lift cable (which admittedly parted and permitted the boom to fall) had been rigged and installed following the launching of the vessel in June 1952, and had not been replaced prior to the accident here involved; (2) the port or up-and-down boom winch, which was being operated at the time the topping-lift cable parted, had also been installed following the launching of the vessel, and had a rated three-ton capacity, with 18 German horse-power; (3) this winch was equipped with a device which automatically interrupted its operation upon the application of a burden exceeding the capacity of the winch; (4) the vessel and her loading gear had been inspected by the ship's surveyor on June 5, 1952, and there had been subsequent annual inspections of such gear.

[fol. 19] It is elementary that the vessel owed libellant longshoreman the non-delegable obligation of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot* v. *Hawn*, 346 U. S. 406; *Alaska Steamship Co. Inc.* v. *Petterson*, 347 U. S. 396. This obligation required only that the vessel and its equipment "be reasonably fit for the use for which it was intended." *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, 400.

The Topping-Lift

The topping-lift which supported the boom before it fell had been installed in its position at the time the vessel

was originally rigged in May or June, 1952. There was much evidence about the topping-lift which parted.[1] I find

[1] There were two sets of exhibits of wire rope, each set purporting to consist of pieces of the topping-lift which parted and permitted the fall of the boom. Libellant offered L-10 and L-13; respondent vessel offered R-38 and R-39-a, b and c. L-10 and L-13 are respectively two pieces of obviously rusty wire rope consisting of six strands around a center hemp core, each strand consisting of 19 individual wires around a smaller hemp center. L-10 is a piece approximately 5 feet in length, having a diameter of 7/8 of an inch and a circumference of 2½ inches, one of the ends of which has been subjected to some crushing or pinching force, but the strands at this end are not unravelled. For a distance of about 18 inches from the other end the strands are unravelled and the individual wires of some of the strands are unravelled from their center cores. This exhibit is corroded throughout, the hemp cores are completely dry, the individual wires are brittle and break readily when bent with the fingers. There is no evidence of any internal or external lubricant or preservative upon the exhibit. L-13 is apparently a piece of the same type of wire rope, approximately the same length as L-10, and manifests the same characteristics of corrosion, dryness, brittleness and the absence of lubricant or preservative. The strands for some distance from each end of L-13 have been unravelled and the center core of the exhibit has been exposed for a distance of about 18 inches.

All witnesses who testified after an inspection or analysis of each of these exhibits (L-10 and L-13) were of the opinion that the exhibits manifested conditions of such deterioration as to render them unsuitable and dangerous for use as a topping-lift or as any other element of standing or running gear of the cargo handling facilities of which the fallen boom in this case was a part. Several witnesses testified for libellant that these two exhibits formed parts of the topping-lift which parted and permitted the fall of the boom which injured libellant. Costa, the head foreman of Nacirema (libellant's employer) testified that, shortly after the boom had fallen, he found L-10 lying on the deck of the vessel between the two winches which served hatch No. 1, and that he made comparison and found it similar to the part of the topping-lift which extended out from the drum of the port winch and hung over the block which was welded to the mast table near the winches. The witness showed this piece of wire rope to a representative of Travelers Insurance Company who was on the pier at which the vessel was moored and at whose suggestion the witness placed the exhibit in the trunk of his automobile and ultimately transported it to his home, where he kept it in his garage until October 5, 1955, when he turned it over to another representative of the same insurance company.

Another fellow-employee of libellant, one Dominguez, classified as a gearman for Nacirema, whose duty it was to supply the steve-

[fol. 20] it was rigged in a double-purchase and consisted of 6 × 24 mild plow steel wire rope 2″ in circumference. Since

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dore gangs with articles of gear for their use, was requested by libellant's foreman to cut off a piece of the broken topping-lift which protruded from or hung over the welded block at the base of the mast, in order that the sample might be used as evidence. This witness testified that he accordingly cut off the piece as directed and gave it to another fellow employee of libellant, one Willie Smith, by whom the cut piece of wire rope was delivered to libellant's attorney who retained custody of it (except during periods of its submission to metallurgical and chemical tests) until it was marked L-13 in evidence upon the trial. Holmes, another member of libellant's gang, identified the exhibit as the piece which he saw Dominguez cut off the portion of broken topping-lift shown in the photograph L-12. Some further corroboration may be found in the testimony of longshoreman Breitenbach of libellant's contention that L-13 is a piece of the topping-lift which broke. Dominguez further testified that this piece (L-13) appeared to be the same in size, color and condition as the topping-lift from which he says that he cut it.

Willie Smith, another of libellant's fellow longshoremen, testified that he gave L-13 (the piece which Dominguez cut from one end of the broken topping-lift shown in the photograph L-12) to libellant's attorney and that its appearance, when it was marked in evidence on the trial, was the same as it had been when he gave it to the attorney. Smith also testified that the same two pieces of timber which were being handled when the boom fell were successfully removed from the same positions two days later in a similar manner, but without difficulty.

On cross-examination this witness admitted that there was not clearance enough between the top of timber No. 2 to permit it to be rolled and, therefore, that it was necessary to slide it from under the lip of the coaming. (If the timber was 10″ x 10″ in girth and it were to be rolled, its diagonal would be slightly over 14 inches.) Smith admitted that when he heard the warning of the falling boom he did not have time to notice whether timber No. 2 had jammed against the coaming lip.

Another fellow-employee of libellant, Mason, who was working with him on the inshore side of hatch No. 1, testified that when they initially addressed themselves to the two timbers one was partly under the coaming and the other under the lip of the coaming. He and his fellows pulled the first timber out into the square of the hatch and then turned it over once. Libellant then pried up the second timber which, before the insertion of the pry bar, appeared to have a clearance of 3 inches between the top of the timber and the lip of the coaming. When libellant had thus pried up the timber, Mason inserted a piece of wood beneath it about a foot and a half from its after end, timber No. 1 having already been

[fol. 21] she had been launched and placed in commission, the vessel had been plying between different ports in the

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elevated by the insertion beneath it of another piece of wood. Mason then placed the sling upon the cargo hook. He says that then he made an observation to determine whether all was clear and noted that the clearance between timber No. 2 and the lip of the coaming was less than the three inches which had previously existed. It was Mason who then signalled to the winchman first to take up the slack and then to take a strain. He says that both timbers then commenced to move toward the open hatch square, and, when a member of the deck crew cried out a warning that the boom was falling, the timbers were still moving slightly. Another member (Strother) of libellant's work gang says that the taking of the strain caused timber No. 1 to move toward timber No. 2. Mason emphatically stated that there was no jamming of timber No. 2 whatsoever, and that it never touched the coaming nor the lip thereof. He also identified the obviously torn end of the wire rope shown in photograph L-12 and says that it was a portion of the topping-lift which separated and was similar in color and size to the piece of wire rope marked L-13. He also corroborates Smith's testimony to the effect that both timbers were removed two days later by the same procedure.

The witness Sasson, Nacirema's superintendent, was not present when the boom fell, but arrived some 15 minutes thereafter. He testified that Costa showed him a piece of cable which was black on the outside and rusty within, and similar in appearance to L-10. He found the sling still around the timbers, observed that there was clearance between timber No. 2 and the coaming lip, and noticed no evidence of jamming on the timber or of damage to the sling. He says that the piece of topping-lift which hung from the block at the cross-tree of the mast was similar in size and color to L-10. This witness also testified that the two timbers remained in the same respective positions in which they were when the boom fell until they were removed from the hatch on Monday, two days later, and that, in the interval, the topping-lifts on both the port and starboard booms serving hatch No. 1 had been replaced by the vessel's crew.

One James Walker, business agent of the union to which libellant and his fellow-employees belong, came to the scene of the accident in response to a telephone call from Breitenbach and arrived after the libellant had been removed to the hospital. Walker observed that the sling was still about the two timbers, one of which was under the lip of the coaming and the other in the hatch square but both of which were close together. He inspected this sling and found no damage to it, taking no note of any damage to either of the timbers. Walker says that at the time of his inspection there was a clearance of approximately one and a half inches between timber No. 2 and the lip of the coaming and clearance of over one

[fol. 22] Caribbean area and her loading and unloading gear at hatch No. 1 had been in frequent use, handling a variety

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inch between the sling and the coaming lip. He says he found no evidence of jamming of the timber against the coaming lip. This witness further testified that he saw one end of the topping-lift hanging from the mast block at the cross-tree, and another piece at the bottom extending over the mast table block as shown in the photograph L-12. While he was in the vicinity the witness Smith showed him a piece of what he said was the topping-lift and which was later given to libellant's proctor (L-13). It was this witness (Walker) who called Mr. Brass, the proctor for libellant, who arrived on board at about 11:00 A. M., and proceeded to take the numerous photographs which have been marked in evidence in behalf of the libellant.

On the afternoon of the same day (January 2, 1954) the vessel and her gear were jointly inspected by Captain George N. Axiotes, as Surveyor for Nacirema, and Otar Grundvig, as Surveyor for the vessel. Axiotes says that the standing part of the broken topping-lift was hanging from the upper mast block, that it was three-quarters of an inch in diameter and that its condition and appearance was similar in all respects to Exhibit L-13. He also saw the sling still about the two timbers in the hatch with one eye attached to the cargo hook and reports no damage to the sling or evidence of damage to the after end of timber No. 2. This witness did admit that there was a mark upon this timber resembling the paint on the coaming edge, but says that it evidently did not result from loading or unloading, but probably was due to some contact between the edge of the timber with the edge of the coaming. His measurement of the end of each of the timbers indicated that their dimensions were 8" x 8". This surveyor was of the opinion that if there had been a jamming of the timber against the coaming the topping-lift would be the last part of the gear to let go and that if more than a three-ton load had been imposed upon the winch, it would have stopped automatically, according to information given him by the vessel's first officer who accompanied him during his inspection.

Each of the winch operators testified. The testimony of Harps who operated the up-and-down boom winch is elsewhere hereinafter reviewed. Crowther, the operator of the starboard winch at the time the up-and-down boom fell into hatch No. 1 says that his winch was not in operation and he was standing by the machine smoking. He it was who cried out when he saw the boom coming down, and later he saw Costa with a piece of rusty wire cable in his hand which he said is L-10 and resembled the broken end of the topping-lift which he observed hanging over the block welded to the mast table.

Several witnesses in behalf of the respondent vessel denied that L-10 and L-13 were pieces of the topping-lift which parted, but that, on the contrary, Exhibits R-38 and R-39-a, b and c constituted

[fol. 23] of cargo loads. The so-called "safe working load" of the boom and of the cargo runner (the latter measuring 2½"

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portions of the wire rope which formed the topping-lift at the time the boom fell. There seems to be no contradiction that the topping-lift which was in position at the time the unloading operations were turned over to libellant and his fellow stevedores, was rigged substantially in the manner exemplified in the model of a portion of the vessel, marked R-13 in evidence. According to respondent's witnesses, one end of the topping-lift terminated in an eye surrounding a thimble which was secured by a shackle to the bottom of a single-sheave block at the cross-tree of the mast, thence extended through the single-sheave block at the head of the boom, thence back through the sheave of the first-mentioned block, thence down the mast and through a block welded to the mast table near the port winch, and thence around a drum of that winch. These witnesses say that the topping-lift (which was installed when the vessel was launched, and which admittedly parted at the time of the fall of the boom on January 2, 1954) was composed of mild plow steel wire rope, of 6 x 24 construction, with a hemp center in each strand and a hemp core in the midst of the strands. This rope was ⅝" in diameter and 2" in circumference. This circumferential measurement was indicated for the topping-lift on the rigging plan which was marked Exhibit R-40 in evidence, and to which the captain of the vessel (Peters) says her rigging conformed when she was fitted out after launching.

R-38 is a piece of 6 x 24 wire rope, approximately six feet in length, at one end of which the strands are widely unravelled, and, for a longer distance from that end, one of the strands has apparently been manually unravelled from the remaining strands in their normal position. The opposite end of this exhibit is prevented from unravelling by a temporary serving of twine and its strands and wires appear to have been manually cut. The other end of the exhibit indicates that the strands and wires parted under strain. Throughout its length this exhibit, and also R-39-a, b and c, are black in color, and evidently have been covered with grease which still comes off readily on the hands of one who handles them. While the individual wires at the end of this exhibit have apparently parted under strain and show some corrosion, the corrosion appears to be of a character and degree which would normally take place during the period between January 2, 1954 and the time of trial. The exhibit exposes for some distance from the end the center hemp core of the rope which is also greasy to the touch and by observation. R-39-a is obviously another portion of the same rope of which R-38 originally formed a part. The latter exhibit is approximately 24 feet in length, one end of which is in the form of an eye surrounding a steel thimble, and the opposite end apparently has been manually cut and is served with wire. R-39-b and R-39-c are seemingly pieces of the same wire rope of which the other exhibits

[fol. 24] in circumference) was, according to the stipulation of the parties, three tons each. Single wires taken from R-

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formed a part. R-39-b consists of a piece approximately four feet long, evidently manually cut at each end, one end of which is served with wire and the other is unserved, but neither end of which is unravelled, while R-39-c is a short piece of what is said to be the same rope as that from which the other pieces were taken. This exhibit is not unravelled, is served with wire at one end, and with twine at the opposite end and between the ends. There was testimony (necessarily uncontradicted) that another portion of the topping-lift, of which respondent contends Exhibits R-38 and R-39-a, b and c were parts, was taken to Bremerhaven, Germany, the place at which the vessel was built, for purposes of testing, and was not subsequently returned to this country.

Peter Peters, the Captain of the vessel (who was, with his First Mate, Herman Buss, in his quarters just abaft the No. 1 hatch at the time of the accident), testified that he heard the noise of the fall of the boom and immediately came out, with his First Mate, and inspected the conditions of the scene. He saw the boom lying on the cargo and the libellant lying near the boom. He also observed the two timbers (above referred to as No. 1 and No. 2) surrounded by the sling. One eye of the sling was still attached to the cargo hook. The Captain says that he and Buss inspected the two broken ends of the topping-lift; one of which was hanging down the mast and the other was lying on the deck at the foot of the mast. He describes the topping-lift as in good condition, black in color and covered with grease which had been applied to preserve it. He identifies R-38 and R-39-a, b and c as being pieces of the topping-lift which parted, and which, like these exhibits (so found by the Court's actual measurement) were 2" in circumference. Captain Peters was assigned to the vessel while she was in course of construction at Bremerhaven, Germany, in November 1951, and he testified that the topping-lift which parted on January 2, 1954 at Port Newark, New Jersey, was the same topping-lift which had been installed upon the particular boom when the vessel was initially rigged and that the Exhibits R-38 and R-39-a, b and c, were actual pieces of that topping-lift taken and kept in the custody of the vessel (and examining experts) from the time they were replaced following the fall of the boom until they were admitted in evidence on the trial. This authentication of identity of these respondent's exhibits with the topping-lift which parted was corroborated by the testimony of the First Mate, who says that, at the request of libellant's witness, Axiotes (who inspected the vessel and her gear shortly after the boom fell) he (Buss) cut off a piece of a strand, about a foot in length, from the portion of the broken topping-lift which was hanging from the mast cross-tree. This was then wrapped in a piece of newspaper by Captain Peters and given to Captain Axiotes who placed it in his pocket, after which

[fol. 25] 38, and tested by Isaac Stewart, Chief Engineer of the New York Testing Laboratories, disclosed a breaking

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the two ship's officers and Axiotes had coffee in the Captain's quarters, where libellant's proctor found them upon his arrival, within an hour or so after the accident had occurred. It was later on the same day, according to the testimony of Buss, that the broken topping-lift was removed from the up-and-down boom (as was the topping-lift which served the Burton boom at the same hatch) and that, because the vessel had no more rope of the same circumference (2″), the two topping-lifts were replaced by new wire rope 2½″ in circumference. The broken sections of the topping-lift of the up-and-down boom, according to the testimony of Buss, were placed in a locker on board the vessel where they remained until a portion of one of them was submitted for testing in Germany, and the other portions (R-38 and R-39-a, b and c) were examined and tested in the United States. The piece of strand which Buss says he cut off and which was given to libellant's expert Axiotes, is shown to be missing from R-38. Axiotes confirmed his receipt from Buss of this 12-inch piece of strand.

Olaf Jacobsen, an agent of the vessel, came aboard about an hour before the boom fell and was in the Captain's quarters at the time the accident occurred. He also observed the position of the boom after it had fallen, and saw one portion of the broken topping-lift hanging from the cross-tree and the other portion lying on the deck. He testified also that both portions of the severed cable were black in color, ⅝″ in diameter and that R-38 and R-39-a, b and c are pieces of the same topping-lift. He testified that one end of R-38 had been manually cut, while the other end of the same exhibit had been broken or torn. The end of R-39 opposite that which formed the eye had also been manually cut. Jacobsen says he found no evidence of corrosion on the broken end of R-38.

Joachen Gimm was the member of the crew of the vessel whose duty, he says, was to apply protective grease to the topping-lift cable periodically. His attention also was attracted to the fall of the boom by the sound thereof and, under the orders of the Mate, he fetched his camera and took photographs of objects and conditions immediately succeeding and at the scene of the accident. He testified that the parted topping-lift was in two pieces, one hanging from the block at the cross-tree on the mast to a point about two or three feet above the deck, and one end of the other piece lying on the deck with its opposite end around the drum of the port winch. He denied that a separate piece of cable similar to either L-10 or L-13 was lying on the deck. He identified R-38 and R-39-a, b and c as pieces of the broken topping-lift which he described as being black in color and composed of wire two inches in circumference, to which he had applied, by hand, with pieces of waste, protective grease two or three weeks prior to the fall of the boom.

point of between 158 and 177 pounds. He computed the tensile strength of the entire wire rope at 19,600 pounds, representing 80% of the product of the average strength of the individual component wires by the number of the wires. Mr. Stewart defined the safe working load of a rope as represented by one-fifth of its breaking load. Accordingly, the safe working load of R-38 would be approximately two tons

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Another member of the crew, who participated with Gimm (according to the latter's testimony) in applying the protective grease to the topping-lift, was Carl Heinrichsdorff. His testimony, together with that of August Otto, was taken at Bremen, Germany, under commission upon interrogatories and cross-interrogatories as a witness for the respondent vessel. Heinrichsdorff testified that he did not know the size of the wire rope constituting the topping-lift on the date of the accident, nor the size of the wire rope constituting the guys or the runner of the up-and-down boom. He did testify that the topping-lift was rigged in a double-purchase involving the use of three blocks, and that the boom stood amidship at the No. 1 hatch when he observed it before the accident. He was apparently not asked what, if anything, he had to do with the maintenance of the topping-lift cable.

Buss, the First Mate, had also joined the vessel while she was being rigged after launching, in May or June 1952, in Bremerhaven, Germany. He testified that the booms at No. 1 hatch were provided with topping-lifts 2" in circumference, rigged in double-purchase as called for by the rigging plan marked R-40 in evidence, and that there had been no change in or replacement of these topping-lifts between the time of their intial (sic) installation and the fall of the boom on January 2, 1954. He corroborated Gimm in testifying that these topping-lifts were treated with preservative every two or three weeks and that the last application of the preservative to the topping-lifts had been made at Puerto Cabezas, Nicaragua, from which the vessel had sailed for Port Newark, New Jersey in December, 1953. Buss testified that the topping-lift had been taken down and inspected by him in May and again in August, 1953. In addition to his emphatic insistence that R-39 and R-39-a, b and c were portions of the topping-lift with which the boom was provided and which parted, Buss denied that wire rope of the size of L-10 and L-13 was ever used for topping-lift purposes on the vessel before the accident involved in this case, and that if the latter exhibits were actually taken from the vessel, they were pieces of mooring line left over from mooring line repairs, which were frequently required by reason of the frequent immersions, exposure and strains attendant upon their use and the impracticality of treatment with lubricant or preservative of wire devoted to such use.

if it were rigged in a single purchase, but its double-purchase arrangement would render it stronger by at least 50%. I conclude, therefore, that the safe working load of the topping-lift with which we are here concerned was at least three tons. It was the opinion of Stewart, as well as that of respondent's witness Otar Grundvig, a Marine Surveyor, who also examined it, that the topping-lift which parted was in good condition and appeared to be "very good wire". On the other hand, libellant's witnesses, John P. Brady, a Chemical Engineer, and Theodore A. Schneider, an Assistant Professor of mechanical engineering, each of whom examined R-38 and R-39 over two years after the topping-lift parted, were of the opinion that the rope was in a condition rendering it unsafe for use as a topping-lift with gear of the rated capacity stipulated for the boom and runner serving No. 1 hatch on the vessel in question. Brady found the exhibits pliable, greasy and dirty, indicating deck and handling wear, manifesting evidence that the wires had been galvanized, with a consequent reduction of tensile strength below what the witness believed would be the factor of safety. Schneider found the wire insufficiently lubricated, its core dry and some evidence of corrosion, conditions which, in his opinion, rendered the wire rope unsafe for use as a topping-lift for the boom.

It was also the opinion of Robert A. Simons, a Marine Engineer and designer of topping-lifts for vessels, that a topping-lift should be equal to or greater than the cargo runner in diameter and circumference.

[fol. 26] Walter J. Byrne, Industrial and Marine Safety Consultant (who with Simons also testified for the respondent-impleaded), said that he had never seen a two-part topping-lift of wire rope 5/8" in diameter on any vessel, although he had inspected thousands. Byrne considered a topping-lift *running* rather than *standing* gear because of its function to raise and lower, as well as to hold, the boom, and he disapproved of the use of 5/8" wire rope as a topping-lift, rigged in a double purchase. Byrne admitted, however, that there was nothing wrong with a two-part topping-lift, provided the size of the rope was appropriate, and he added that a 5/8" wire in one position could be stronger than an inch wire in another position.

Since I am persuaded that the topping-lift which failed, and its condition, is exemplified in the exhibits R-38 and R-39, and since the testimony is uncontradicted that that topping-lift had been in use since the initial rigging of the vessel in June 1952, apparently with the same boom and a cargo runner of the same rated capacity as at the time of the accident, I find that the topping-lift and its manner of rigging, which was in use just prior to the fall of the boom, was adequate and proper for the loads for which the rest of the gear was designed and intended.

The Port Winch

I am satisfied by the evidence in this case that, just prior to the fall of the boom which caused the libellant to sustain injuries, power was being furnished to this up-and-down boom by the port winch, which was located just forward of hatch No. 1, and which was being operated (as was the starboard winch which powered the Burton boom) by a fellow-employee of libellant.

The operation of the winch which served the boom which fell is disclosed by the testimony of Winchman Harps, another employee of Nacirema, who tells us that when Mason signalled to him to take up the slack, he moved [fol. 27] the control lever slightly and then stopped, presumably responsive to a further signal. Mason then signalled for the taking of a strain and Harps pushed the operating lever slightly further forward but not to a degree which would apply full power to the motor. It was upon this second power application that the topping-lift parted and the boom fell. Harps says that he saw the portion of the broken topping-lift disclosed in the photograph L-12 and that it had an appearance and was in a condition similar to that of the pieces of wire rope marked L-10 and L-13 respectively.

As stipulated at the commencement of the trial, this port winch was provided with a device set to interrupt its operation when a load or burden in excess of its capacity was imposed upon it. More specifically, in answer to interrogatory numbered 29 of those propounded by the respondent-impleaded to the vessel, requesting specifica-

tion whether the winch "contained a device by which its operation ceased upon the application of a burden in excess of its capacity," the vessel responded affirmatively. The First Mate, Buss, testified at length with respect to the nature and manner of functioning of the so-called "cut-off" device to which the interrogatory referred. Using a diagrammatic illustration upon the blackboard, Buss explained that the winch, rated at 18 German horse power, was driven by electricity, the current being applied through a rheostat which regulated the quantity of the current flowing through the motor. As the Court understands the First officer's explanation, the "cut-off" device consisted of a circuit breaker, actuated by an induced magnetic current. Transmission of the power from the motor was controlled by a lever actuating a clutch arrangement. When the lever was pushed forward by (away from) the operator of the winch, the draft on the cargo runner was raised or hoisted, and when the lever was pulled backward (toward the winch operator), the draft was lowered. The vertical position [fol. 28] of the lever, while permitting the motor to continue to run, kept the clutch in neutral, so that the drums on the winch did not receive the torque of the motor.

Libellant and his fellow employees Mason, Strother and Smith were working on the inshore side of No. 1 hatch, and, between the time of the commencement of their work that morning and the time of the fall of the boom, they had been "building" lumber, i.e. piling or making-up drafts which were picked up by slings attached to the hook on the runner. At about 9:00 A. M., the stowed timber cargo in the hold of No. 1 hatch had been lowered to a point below the level of the deck, and libellant and Mason then undertook to prepare for removal two timbers which lay longitudinally of the vessel, in the hold, and which measured between 30 and 35 feet in length and (as estimated) 8" × 8" or 10" × 10" in girth. One of these timbers lay within the open square of the hatch, while the other lay with its after end to the inshore side of the under-curving lip of the starboard hatch coaming, two or three feet forward of the after coaming of the hatch, the forward end of this timber lying near the forward end of the hatch and well below the lip and edge of the starboard coaming.

Libellant, with a crow or pinch bar, had pried up the after end of the timber which was beneath the deck, and his fellow employee, Mason, then put a wooden chock beneath the timber. Libellant then removed the bar, and his partner then placed a wire rope sling (furnished by the stevedore contractor and similar in appearance to IR-1 in evidence) around that timber and also around the timber which lay within the open square of the hatch, so that the sling passed around both timbers at a point approximately one foot forward of their respective after ends. Mason says he then looked at the inshore timber to see whether it would clear the coaming and then hooked the eyes of the sling on the hook at the end of the cargo runner. Thereupon, according to the testimony of libellant, in which he was generally corroborated by Mason, they both stood [fol. 29] clear of the timbers at a distance of about six or seven feet, and Mason signalled to the port winchman to "take up the slack". Mason says that the winchman responded appropriately and was then stopped by a further signal from him. Mason next signalled to the winchman to "take a strain". Mason says that, upon the response of the winch to the latter signal, the sling tightened and the timber which was inshore of the hatch coaming commenced to move towards the square, when suddenly a cry was heard from someone on deck to "look out", and, while the timber was still moving slightly, the boom fell upon the cargo in the hatch square, and the block or blocks at the head of the boom struck and knocked libellant down. Both libellant and Mason say that the inshore timber did not "jam" against the edge of the lip of the starboard coaming, and that before the slack was taken up by the winch operator, there appeared to be a clearance between the timber and the edge of the coaming of something under three inches.

Victor Harps, the operator of the port winch (who was another fellow employee of libellant), testified that when Mason put the eyes of the sling on the cargo hook, he signalled to him to take up the slack, and that he did so and then stopped. Upon the signal for the taking of a strain, the winch operator applied more (but less than full) power, and thereupon the boom and the topping-lift fell. The winchman says that as soon as he applied the

strain he heard the other winchman holler and saw the boom fall. Harps said that one of the members of the vessel's crew had showed him a switch by means of which he could shut off the power of the winch, but he had received no instructions from anyone how to operate the winch.

Edward Crowther, the operator of the starboard winch, testified that his attention was first directed to the falling of the boom when he heard a noise and looked around. This winchman had previously slacked off his winch when the up-and-down cargo hook was lowered by the other winch [fol. 30] into the hatch square by Harps. No one, apparently, observed or described the movements of the head of the boom under the effect of the application of power to the winch immediately before the boom fell.

Before the stevedores came aboard at 8:00 o'clock that morning, the vessel's crew had hoisted the boom to a position with its head above and perpendicular to a point in the center line of the hatch square. There was also testimony that the stevedores were forbidden to change the angle of the boom with the deck, but that the stevedores changed the position of the head of the boom to a position above and perpendicular to a point two feet to port of the port hatch coaming, and about one-third of the length of that coaming forward of its after end. It also appeared (without contradiction) that libellant's fellow-employees changed the points of fastening of the port boom preventer and guy respectively—the preventer to a cleat on a stiffener in the rail of the vessel opposite a point approximately one-third of the distance forward from the after end of the hatch and one and one-half feet above the deck, and inboard from the rail, and the guy to a point on the rail approximately two-thirds forward of the after end of the port hatch coaming.

After the boom fell, the Captain of the vessel, its first officer, the seaman Gimm, Captain Jacobsen and Inspector Grundvig examined the position of the inshore timber with respect to the inshore edge of the under lip of the hatch coaming. They testified that they found the upper inboard edge of the timber for a short distance forward of its after end to have been in contact with and to have been dented

by and stained with red paint from the inshore edge of the coaming lip. Numerous photographs were offered in behalf of libellant and respondent vessel respectively, and were marked in evidence. L-16 taken by libellant's attorney, for example, shows the sling around the two timbers, and a portion of the after end of the inshore timber well under and somewhat to the inshore side of the hatch square [fol. 31] face of the starboard coaming. This position is more clearly and impressively shown in R-1, R-5, R-14, R-16, R-17, R-35, R-36 and especially in R-6. Despite testimony to the contrary given by libellant and his fellow employees, I am persuaded by the clear weight of the evidence that either the taking of the slack or the taking of a strain by the port winchman on the sling which was around the two timbers caused the inshore timber to turn or roll (rather than to slide) toward the off-shore edge of the under lip of the starboard coaming, or otherwise to become jammed or drawn against the coaming edge, thus effectively blocking the further movement of the timber, and that the continued application of power to the winch imposed upon the topping-lift of the boom such an excessive strain as to cause it to break and the boom to fall.

The question immediately arises: Why did the power running to the winch fail to shut off automatically if and when an excessive load was built up as above concluded?

Assuming the respective dimensions and safe working loads of the respective components of the gear, the positions of the port boom and its preventer and guy, the direction of the cargo runner extending from the boom head to the sling around the two timbers (as disclosed by testimony offered in behalf of the vessel), and the obstruction by the lower edge of the starboard hatch coaming to the movement into the hatch square of the offshore timber, respondent's witness, Isaac Stewart, by the erection of triangles, the determination of angles and the application of the law of the parallelogram of forces, calculated that when the operator of the port winch took a strain in response to the gangwayman's signal to do so, a load or burden was suddenly applied to the topping-lift of the port boom amounting to 42,300 pounds. On the other hand, the witness Robert A. Simons, testifying as an expert in behalf of the respondent-

impleaded, calculated, upon similar factual assumptions, that the load imposed upon the topping-lift by the positions of the vangs when the power was applied to the winch as [fol. 32] aforesaid, was 34,000 pounds. It is apparent, therefore, that the topping-lift parted under a strain of between 17 and 21 tons, or several times the safe working load of the topping-lift and other units comprising the unloading gear. It has been stipulated that the winch was provided with a device designed and set to shut off the current to the winch upon the application of a load of slightly in excess of six tons. After the topping-lift parted and the boom fell, an inspection of the winch indicated that the cut-off device had functioned, but the Court is unable to find in the evidence at what instant and under what strain the current was cut off. Harps, the winch operator, testified that he had applied less than full power to the winch when the topping-lift parted. The effect of the quantity of current flow upon the power developed by the motor is explained by the witness Simons, as follows:

> "The greater the current applied to a motor, and therefore applied to the winch, the more horse power and torque the motor will have and, therefore, the more pull on the load or on the hoist wire. In other words, the greater the current that goes through that motor, the more power you are supplying to the motor, and the more power you are going to get out of that motor, and the more lift from the motor."

The witness added that "what ultimately shuts the current off is the resistance to that horse power of the motor * * * to be found in the load which is being hoisted." There was testimony uncontradicted, that after the boom had fallen, Buss undertook to operate the winch, noticed that the cut-off device had functioned, threw a switch necessary to restore current flow, and then demonstrated that the winch operated perfectly. The cut-off device was susceptible of being so adjusted as to operate automatically at different degrees of excess load on the gear. In this case, apparently, the device was set to function at a much lighter load than [fol. 33] was imposed upon the gear although it was set

to operate at a load slightly more than twice the safe working load of the topping lift.

The Liability of the Vessel

I conclude on the basis of the facts as found above that the setting of the winch cut-off device at the time the winch was turned over to libellant's fellow-employees for operation rendered the respondent vessel unseaworthy and therefore liable to libellant.

The Proximate Cause of the Accident

Having found as a fact that the efforts of Nacirema to extract from beneath the deck the timber which lay or was drawn against the under-lip of the coaming, and that the positioning, by Nacirema employees, of the head of the boom and the preventer and guy created a load on the topping-lift greatly in excess of its safe working load, I cannot avoid the conclusion that the primary cause of the parting of the topping-lift and consequent fall of the boom which inflicted the bodily injuries upon the libellant is to be found in the impropriety and negligence of Nacirema in its handling of the gear and winch.

The Vessel's Right to Indemnity

There was no contract between the owner of the vessel and Nacirema. On the contrary, one John Joseph Smith, President of Insular Navigation Company, steamship agents and brokers, testified on deposition taken by the respondent that Insular Navigation Company, acting in behalf of Ovido Compania Naviera S.A. Panama, executed a written contract with Nacirema for the unloading of the vessel at Port Newark, New Jersey. The vessel had been chartered by the owners to Ovido through Insular. Neither the charterer nor its agent is a party to this litigation. [fol. 34] Nevertheless, libellant and his fellow employees of Nacirema were impliedly, if not expressly, invited to come and be aboard the vessel for the purpose of unloading her cargo and to use the vessel's tackle and gear in a manner appropriate for that purpose. Cf. *Pope & Talbott, Inc.*

v. *Hawn*, 346 U. S. 406; *Freitas* v. *Pacific-Atlantic Steamship Co.*, 9 Cir., 218 F. 2d 562. Entirely apart from its obligation under its contract with the agent for the charterer of the respondent vessel, Nacirema owed the vessel and her owners the duty of using due care in her unloading. *Cornec* v. *Baltimore & Ohio R. Co.*, 4 Cir., 48 F. 2d 497; *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co.*, 9 Cir., 32 F. 2d 886. See also, *Rich* v. *United States*, 2 Cir., 177 F. 2d 688.

In the language of Judge Frank in *Palazzolo* v. *Pan-Atlantic Steamship Corp.*, 2 Cir., 211 F. 2d 277, 279, affd. sub nom. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.* by an equally divided Court, 349 U. S. 901:

> "indemnity over is recoverable where, as here, the employer's negligence was the 'sole' 'active' or 'primary' cause of the accident. Nor does the absence of a formal contract bar indemnity" (citing *Rich* v. *United States*, *supra*).

The vessel in the case at bar does not seek contribution from the stevedoring contractor as a joint tort-feasor, as was the situation in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282. The respondent vessel in the present case asserts and I conclude as a matter of law that Nacirema's negligence was the sole, active or primary cause of the parting of the topping-lift and the fall of the boom, with its consequent injuries to the libellant, by reason of the negligent manner in which Nacirema through its employees, attempted to extract the timber from its obstructed position beneath the deck of the vessel. Nacirema may not have breached any contract with the vessel's owners, but, through its servants, it violated a duty which it owed to the [fol. 35] vessel to exercise reasonable care in conducting its unloading operations. I find that it failed to exercise that degree of care and that, as a result thereof, it brought into play the unseaworthy condition of the vessel for which the latter would be liable in damages to libellant under the principles enunciated in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Alaska Steamship Co.* v. *Petterson*, 347 U. S.

396; and *Berti* v. *Compagnie De Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397.

The question whether under these circumstances the vessel is entitled to indemnity from the stevedore contractor has recently been discussed by Judge Dawson in *Allen* v. *States Marine Corporation of Delaware*, S. D. N. Y. 1955, 132 F. Supp. 146. In that action, a longshoreman sought to recover damages for personal injuries from the vessel. The vessel filed a third party complaint against the stevedoring firm employing the longshoreman, alleging that the stevedoring firm was the actual tort feasor and that consequently the vessel was entitled to indemnity. The stevedoring firm moved to dismiss. Reviewing numerous decisions, Judge Dawson comments (page 148):

> "Therefore, the question is whether the relationship of Allports Stevedoring Co., Inc. as the stevedoring company engaged in the unloading operations on their ship imported an implied agreement to indemnify the owner of the ship for any damages which he might have to pay as a result of injuries to employees of the stevedoring company. There was no contractual relation between States Marine Corporation of Delaware and Allports Stevedoring Co., Inc., so that if this liability to indemnify existed, it must be based upon the relationship and not based upon any separate contractual obligation.
>
> "If there had been a contract relationship, the right of indemnity would exist because, as a matter to be implied from the contract, the owner of the ship is [fol. 36] entitled to restitution for any damages which it has suffered due to the failure of the other contracting party to perform the duties necessarily comprehended within the contract. *Barber S. S. Lines* v. *Quinn Bros.*, D. C. Mass. 1952, 104 F. Supp. 78.
>
> "But it does not seem that the right of indemnity is necessarily predicated upon the existence of a direct contractual relationship between the parties. See *McFall* v. *Compagnie Maritime Belge*, 1952, 304 N. Y. 314, at page 331, 107 N. E. 2d 463.
>
> "If, as in this case, the shipowner has chartered the ship to another who in turn employs a stevedoring

firm, that stevedoring firm may be held—depending upon the facts which develop at the trial—to have assumed an obligation not alone to the charterer of the ship, but also to the shipowner, to perform its work in such a way that no liability will be imposed upon the shipowner arising out of the active negligence of the company which is actually performing the longshore contract.

"It has been held, at least on motions to dismiss a complaint, that if a vessel owner has been found responsible to a seaman for breach of its non-delegable duty to provide a safe place to work, and that breach resulted from the active negligence of the impleaded defendant and not from any active negligence of the owner of the ship, the owner of the ship would have a right to indemnity. In such an event, an implied contract of indemnity would arise because of the relationship between the parties. *DiMeglio* v. *The Black Condor*, D. C. S. D. N. Y. 1954, 120 F. Supp. 865; see *Valerio* v. *American President Lines*, D. C. S. D. N. Y. 1952, 112 F. Supp. 202."

I concur in the reasoning of Judge Dawson, believing that it sets forth the only reasonable, equitable answer to the question which he and the instant issue poses.

[fol. 37] I therefore conclude that the vessel is entitled to indemnity from Nacirema for the damages to be awarded libellant as hereinafter stated.

Injuries

Libellant testified that when the boom fell he was struck in the back and pinned to the surface of the cargo of timbers in the hatch. He was unable to determine what hit him, because he was knocked into a prone position upon the cargo and lapsed into unconsciousness after a period of a few moments. When he regained consciousness, a weight, which had been resting upon his lower back, was being lifted from him and he suffered great pain in his chest, right hip, both legs, back, right groin, both knees and left ankle.

After his removal from the hatch, libellant lay on deck for about three-quarters of an hour, and was then trans-

ferred to an ambulance, which transported him to St. James Hospital in Newark. There he underwent six or seven blood transfusions. A week after admission to the hospital he was placed in a plaster body cast, extending from chest to groin, and his left leg was also placed in a cast. He was later placed in traction, a steel pin having been passed through his right knee as a traction attachment. He remained in this position until about April 20, 1954. During this period he was under general sedation, and suffered from nightmares in which he seemed to be imaginatively dodging falling objects. He was discharged from the hospital on April 20, 1954, on crutches, using a brace for his back, which had been provided for him shortly before he left the hospital. He continued to receive treatments from Dr. Edwards (who had attended him while in the hospital), and these treatments continued until June 1, 1954, when he commenced receiving physiotherapy at Presbyterian Hospital in Newark, together with whirlpool treatments for his ankle, heat and massage treatments to his back and diathermy to his groin. These treatments, which were received [fol. 38] thrice weekly, extended over a period from June 1 to December 10, 1954. At the conclusion of that period, he commenced to receive treatments at the hands of a nurse furnished by Travelers Insurance Company in Newark. These treatments continued to February 13, 1955, and consisted of heat and massage. In March of 1955, after further X-rays, libellant commenced undergoing treatments from Dr. Lohman, which consisted of diathermy to his back and electric shock. These continued until February 1956, shortly before the commencement of the trial of this case.

On April 2, 1955, libellant unsuccessfully attempted to earn some money by shining shoes, but after a week's trial, he discontinued his efforts because of intense pain. At the time of trial, libellant was still unable to stand long on his feet, was unable to walk more than a short distance, and still suffered pains in his back, legs, groin and stomach. He is unable to sit long, his pain is increased in inclement weather, and he requires the rigidity of a board beneath his mattress when attempting to sleep. This man still required the aid of a cane in walking, and, at the site of an adherent, permanent two-inch scar, which extends

from the external malleolus of the left ankle down toward the heel, suffers severe pain and limitation of motion.

On X-ray, libellant was found to have suffered fractures of the transverse processes of the first, second and fourth lumbar vertebrae, on the right side, and of the transverse processes of the second and third lumbar vertebrae on the left side, with separation of the fragments. He also suffered a subluxation of the right sacro-iliac joint, and fractures of the superior and inferior rami of the right ischial bone, with marked overriding of the fragments. He further suffered a separation of the symphysis pubix, a comminuted fracture of the inferior ramus of the left pubic bone and a probable fracture of the superior ramus of the right ischial bone with the displacement of fragments. There were also revealed a comminuted fracture of the lower end of the left tibia, involving the medial malleolus [fol. 39] and articular surface, as well as a comminuted fracture of the lower end of the left fibula which included the external malleolus. There was a widening of the ankle joint mortise, with slight forward subluxation of the foot. There was also X-ray evidence of a transverse fracture of the proximal third of the shaft of the right fibula, without displacement of the fragments.

In addition to his numerous and permanently disabling orthopedic injuries, and by them induced, in the opinion of a competent neuropsychiatrist, libellant suffered shock and an anxiety reaction with a conversion hysteria.

I find that libellant suffered the foregoing numerous, severe and continuingly painful and permanently disabling injuries as a proximate result of the fall of the cargo boom hereinabove referred to.

Damages

At the time he was injured on January 2, 1954, libellant, Crumady, was 42 years of age, and had been employed as a longshoreman for eight years previously. I find from the evidence that he suffers a degree of permanent disability which has prevented and will continue to prevent his resuming that occupation. His gross wages for 1953 were $4,070.45 (according to Internal Revenue Service Forms

W-2 marked L-6 in evidence). Letter of May 8, 1956 to libellant's attorneys from James F. Hughes, Manager of the General Actuarial Division of The Prudential Insurance Company of America, marked exhibit L-46 in evidence, indicates that libellant at age 43 had an expectation of life of 25.03 years (based upon the United States Life Mortality table for non-white males, to which category libellant belongs). The Actuary further states in his letter that the "present value" of $1.00 per annum at 3% compound interest, is $15.9302, from which he computes, upon the assumption of weekly earnings of $70.00 less taxes, or annual earnings of $3,640.00, that it would require [fol. 40] a capital fund of $57,985.93, invested at 3% compound interest, to produce $70 a week for such expectancy. I conclude that it is improbable that libellant would have continued to earn $70 a week throughout his life expectancy. At the time of the trial libellant required a cane to assist him in getting about and still suffered pain at certain injury sites in varying degrees of intensity at irregular intervals. Despite the absence of specific evidence so indicating, my observation of libellant and consideration of the nature and degree of his permanent disability leads me to judicially notice the probability that he can still engage in some type of gainful occupation which does not involve heavy manual labor. Under all of the circumstances, therefore, I believe that a principal sum of $25,000 is a fair amount to award libellant on account of past and future losses of earnings.

Additional items of special damages are medical and hospital expense, as well as taxi fare for trips to and from hospitals as an outpatient, from June 1, to December 10, 1954 (thrice weekly at $2.00 per round trip). Libellant's care and treatment at St. James Hospital in Newark involved an expense of $2,411.25, and that at the Presbyterian Hospital in the same City (for outpatient treatments) totalled $590.90—a grand total for hospital expense and related transportation of $3,162.15.

In addition to these charges, libellant required treatment by Charles H. Edwards, M. D., at a cost of $1,005.00. Dr. Herman Lohman, M. D. who treated libellant from May 1955 until February 1956 at his office, rendered a bill in the

amount of $510.00 (including X-rays necessarily taken by him), and this physician was of the opinion that the persistence of pain at the site of the comminuted fractures of the left tibia and fibula extending into the ankle joint could probably be terminated by a fusion at the ankle joint, which the Doctor estimated would reuire (sic) hospitalization of from three to three and one-half weeks and the wearing of a cast for from three to three and one-half months, physio- [fol. 41] therapy and post-operative care.. The Doctor's estimate of cost for this surgical intervention and attendant expense totalled $850.00. Thus I reach a total for medical expense of $2,365.00

Libellant was still completely disabled at the termination of his treatment by Dr. Edwards, who was of the opinion that he would require considerable further treatment. This he received at the hands of Dr. Lohman and in the form of physiotherapy as a hospital outpatient. Dr. Lohman found libellant completely disabled for heavy work at the time of the trial and that he had achieved maximum possible improvement except for the recommended fusion operation. For his pain, suffering, temporary and permanent disability I believe, therefore, that the libellant is entitled to the sum of $25,000.00.

I therefore award libellant $55,527.15 against claimant Joachim Hendrik Fisser, as owner of respondent vessel Joachim Hendrik Fisser, and award judgment in a like amount in favor of said claimant, Joachim Hendrik Fisser by way of indemnification and in exoneration of the liability of said vessel, against respondent-impleaded, Nacirema Operating Co. Inc.

The foregoing opinion shall constitute the Court's findings of fact and conclusions of law in this case, and an order for the judgments awarded hereby may be presented in accordance herewith.

Reynier J. Wortendyke, Jr., United States District Judge.

[fol. 42]

In United States District Court

Decree for Judgment—August 15, 1956

This cause having duly come on to be heard, in its regular order, upon the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties after trial without jury, and the Court having duly considered the pleadings filed herein, the testimony of the witnesses, the exhibits and the proofs submitted, and it appearing that libellant has filed a libel in rem charging the respondent vessel with being unseaworthy, and the claimant, Hendrik Fisser Aktien Gesselschaft, answering said libel having denied the unseaworthiness of the vessel owned by it and having filed a bond consenting and agreeing that if the libellant recovered, a decree may be entered against claimant, and claimant having filed a petition impleading the respondent-impleaded and charging it with impropriety and negligence in the handling of the respondent's gear and winch, thereby seeking indemnification from the respondent-impleaded, and the Court after due deliberation having rendered and filed an opinion in writing, which is made a part hereof, finding the respondent vessel unseaworthy and awarding the libelant the sum of $55,527.15 against the claimant, Hendrik Fisser Aktien Gesselschaft, as owner of the respondent vessel, Joachim Hendrik Fisser, and a judgment in a like amount in favor of said claimant, Hendrik Fisser Aktien Gesselschaft, by way of indemnification against respondent-impleaded Nacirema Operating Co., Inc.; it is

Ordered, Adjudged and Decreed on this 15th day of August, 1956, that the libellant, John H. Crumady, is awarded judgment and shall recover for himself of the respondent, Joachim Hendrik Fisser, her engines, tackle, apparel, etc., and claimant, Hendrik Fisser Aktien Gesselschaft, owner of respondent vessel, te (sic) sum of $55,527-.15, together with his costs to be taxed, including the sum of [fol. 43] $614.41, paid by the libellant to the court reporter for stenographic fees, and interest thereon from the date hereof until paid; and it is further

Ordered, Adjudged and Decreed that a judgment in the sum of $55,527.15, and such interest as is paid thereon, together with libellant's taxed costs is awarded claimant, Hendrik Fisser Aktien Gesselschaft, by way of indemnification of the aforesaid vessel against the respondent-impleaded, Nacirema Operating Co., Inc., and also claimant's taxed costs, including the sum of $614.41 paid by the claimant to the Court reporter for stenographic fees, upon its petition impleading said respondent-impleaded.

Wortendyke, U. S. D. J.

Dated, August 15, 1956.

[fol. 44]

Claimant's Appendix—Filed March 30, 1957

In United States District Court
For the District of New Jersey

John H. Crumady, Libellant-Appellant,

—against—

Joachim Hendrik Fisser, Her Engines, Tackle, Apparel, etc., and Joachim Hendrik Fisser and/or Hendrik Fisser, Respondent-Claimant-Appellee and Appellant,

—against—

Nacirema Operating Co., Inc., Impleaded Respondent.

Transcript of Testimony (Excerpts)

Charles Irving Hubert—for Respondent.

Direct examination.

By Mr. Ciehanowicz:

* * * * * * *

Q. I believe you testified that all electrical winches have overload protective devices.

* * * * * * *

A. To the best of my knowledge all the winches I have come across—as a matter of fact, most all electrical motor operating equipment over one horsepower have overload protective devices.

Q. Do you know or can you tell us what the purpose of the overload protective device is?

A. The purpose of the overload protective device is to disconnect the motor from the line when the current exceeds the value for which the device is set. The purpose of that is to protect against damage to the machine.

The Court: You say that the purpose of an overload protective device on a winch is to shut off the power of the engine to the motor?

The Witness: Yes, to the motor.

The Court: For the protection of the motor.

The Witness: Yes, sir. You could say the winch machine, it is a unit.

* * * * * * *

[fol. 45] HERMANN BUSS—for Respondent.

Direct examination.

By Mr. Cichanowicz:

Q. Did you have anything to do with the setting of this overload device?

A. This overload device is set once by the building-in company.

The Court: By the manufacturer?

The Witness: Not the manufacturer. The extra electrical firm which builds these things into the ship. The manufacturer makes it, sends it to us, and one electrical firm does all the mountings of electric wires and motors and connections.

The Court: The electrical contractor for building the ship.

Q. As I understand it—I don't want to belabor the point—as I understand it, the overload device works only if you get too much current?

A. Yes, sir.

Q. And does the load that is being lifted have any effect on that overload device?

Mr. Monigan: Objected to, if your Honor please.

The Court: He means too much resistance, does he not?

Mr. Monigan: Yes.

The Court: You mean too much resistance, too much load? The automatic device works under too much load?

The Witness: Too much amps. That will be the best.

The Court: Too much amps?

The Witness: Yes.

The Court: Too much current quantity.

[fol. 46] Q. Can you illustrate that by the way a fuse works?

A. That is a very big fuse. You see, you can't use an ordinary fuse. You have to have in there blowing coils to get the sparks away and all the stuff. I think that will be too hard to make it understandable if you don't have nothing to do——

Q. I mean, doesn't it work on the principle of a fuse?

A. The ground principle is the same as the magnetic fuse you have at home.

. . . . . .

Q. Now, do you know what kind of an overload device you had on this?

A. A magnetic.

Q. And do you know how it works?

A. Yes.

Q. Will you tell us?

A. The current flowing is getting too high, the magnetic field and the coil is getting too big and so it starts to switch—it shuts the current off.

The Court: Let me take you slowly. When the current gets high——

The Witness: Too high.

The Court: Gets too high, then that induces a magnetic field?

The Witness: Yes, that is a coil like this one with an

iron core, and you have an electric current flowing through is trying to get the right piece of iron to jump up.

The Court: So when the current gets too high the magnetic field in the interrupting device is actuated and the current is cut off.

The Witness: The current is cut off, yes. It is a very big switch. It cuts both off at once, plus and minus. That is a double watt.

[fol. 47] Q. And that has to do only with the electric current?

A. That has only to do with the electric current.

Q. Do you know at what point the cut-off or overload device was set?

A. In our boat, at a hundred per cent plus.

Q. Plus what?

The Court: A hundred per cent of what?

The Witness: Above the ordinary amount the motor takes.

The Court: In other words, twice the capacity?

The Witness: Twice the capacity.

* * * * * * *

Cross examination.

By Mr. Monigan:

Q. The function of the cut-off was to cease the operation of the winch when it got too much current on the winch, wasn't it?

A. Yes.

* * * * * * *

The Court: You ascertained that from the stevedore?

The Witness: When the stuff came down, you see, at first I could not find out myself how things like that could occur. Then I found out that they shifted the boom without telling me, and that hooking there underneath and all this thing mounted stuff up.

* * * * * * *

Q. Well, if the boom would never break, why does it have on it a marking that it has a three-ton capacity?

[fol. 48] A. That is not for the boom, that is for the workmen, that they know that they don't have to work with a bigger weight than three tons, has to be on it. That is international.

* * * * * * *

ROBERT ALLEN SIMONS—for Impleaded-Respondent.

Direct examination.

By Mr. Monigan:

The Court: See if we cannot clear this thing up. Do you know how these automatic cut-offs work, Mr. Simons?

The Witness: I have a general knowledge of how they work.

The Court: Well, can they be set to work under different loads?

The Witness: Absolutely.

The Court: Then there is no fixed design of the cut-off mechanism of an electric winch aboard ship which precludes its setting at a variety of cut-off stages, is there?

The Witness: Well, the Maritime Commission has certain maximum amounts of current that they specify you cannot exceed. You cannot exceed a certain current in the setting. Outside of that I myself know of no special setting except what is considered good practice in the field.

* * * * * * *

The Court: Now, what is the name of the regulation to which you say prescribes the quantity of current at which the winch, the maximum quantity of the current, the mini-[fol. 49] mum quantity of current at which the winch will cut off?

The Witness: I do not know the exact name of the regulation. It is a Maritime Commission regulation or administration, as it is now called. I know something about what the regulation states, that it will allow a maximum of three times the normal load current to run through the cut-off before it cuts off but no more. In other words, a cut-off cannot be set on any ship that comes under the Maritime Administration, so that the setting will allow

over three times the normal load current to pass through the circuit breaker.

• • • • • • •

Q. Is there any—apart from any government regulation —any prescribed standard of design which can be expressed in a percentage of the capacity which the winch is designed to lift for the functioning of the automatic cut-off device of an electric winch?

A. I don't know.

• • • • • • •

Cross examination.

By Mr. Cichanowicz:

Q. You have expressed an opinion about the setting of an overload cut-off on an electric winch. Would you tell us what kind of overload cut-off you were talking about?

A. Yes.

Q. What type was that?

A. An electric circuit-breaker.

Q. Was that a thermal unit?

A. That is a thermal unit.

Q. And that operates by building up heat, isn't that correct?

A. That is correct.

[fol. 50] Q. And when the heat reaches a certain point then the cut-off cuts off, isn't that right?

A. That is correct.

Q. Now, it does take time, does it not, for the heat to build up?

A. Well, naturally, anything would take time, of course.

Q. In other words, when the overload occurs it takes some time before the overload device cuts off?

A. That is correct.

Q. So that the time element enters into the point at which the set-off will be—rather the cut-off will be set?

A. That is correct.

Q. Are you familiar with overload cut-offs that are magnetically operated?

A. Well, I know that they are magnetically operated cut-offs. That is what a circuit-breaker is.

• • • • • • • •

Q. And magnetic cut-off works differently than a thermal one, isn't that right?

A. That is correct. I think that's correct.

Q. Usually a magnetic cut-off is the type which you would call instantaneous cut-off?

A. That is correct.

Q. So that as soon as the overload occurs that turns off?

A. That's correct.

The Court: And is a magnetic cut-off—does that work through an induced secondary current as distinguished from a thermal cut-off working through an increase in resistance in the circuit?

The Witness: I believe so, yes.

Q. You have testified that the Maritime Administration has regulations which provide that the cut-off be set at three times the normal load, isn't that correct—for normal [fol. 51] load current?

A. Yes, that is maximum, by the way.

Q. You cannot go beyond that?

A. No.

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WALTER J. BYRNE—for Impleaded-Respondent.

Direct examination.

By Mr. Monigan:

Q. Did you make any arithmetical computation predicated upon that position of the preventer in relation to the gear on the Fisser on January 2, 1954?

A. I did not make any specific calculations on that basis, no.

Q. Why did you not do so?

A. Because I felt that the arrangement was unrealistic

and that the end result without going through any computations could have been predicted without any question.

Q. And you say they could have been predicted. By that what do you mean?

A. Well, just because of the lead of the preventer in or about the plane of the boom and the topping lift, and where we have a lateral pull, obviously, you are going to get extreme stresses in the entire gear.

Q. And when you say extreme stresses by that what do you mean?

A. In the neighborhood of what Mr. Stewart has developed.

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Cross examination.

By Mr. Brass:

Q. Didn't you testify on direct examination that the topping lift is or should be the strongest part of the sys- [fol. 52] tem?

A. I said that the topping lift is normally the strongest part of the system but everything is relative. We are talking about stresses, not sizes. A five-eighths wire in one position could be, let us say, much stronger than an inch wire somewheres else, so that I do not think that I can segregate sizes.

Q. Well, where is the possibility of the greater stress?

A. It would vary with each condition.

Q. If the rigging was set up in a condition whereby the preventer was to the aft of the hatch as shown on this model, where would the greatest stress be?

A. For that example——

Q. If the preventer was set up to the aft of the hatch as shown on this model, where would the greatest stress be?

A. Well, there you are getting into the realm of—I don't happen to know the relative—I don't recall the relative stress between the topping lift and that preventer or the compressive stress in the boom which is opposite.

Q. Well——

A. I don't think it can be simplified purely from the standpoint that one of the things that you might—may I go on?

The Court: Go ahead.

The Witness: If I make this statement that under many conditions that the problem of failures in ships' cargo gear is with light drafts, it throws out a lot of thinking. I don't think you can take anything here and specify this is to this is to this. I can take a light draft and pull the gear down.

Q. If you place the preventer or any part of the gear in a certain position, is that right?

A. That is right, you can change the picture by placement.

* * * * * * *

[fol. 53] JOHN G. FOLEY—for Respondent in rebuttal.

Direct examination.

By Mr. Cichanowicz:

Q. Mr. Foley, are you familiar with electric winches that have an electro magnetic overload relay?

A. An electric magnetically actuated, yes. They are instantaneous type relays.

The Court: What do you mean by instantaneous type?

The Witness: When the current reaches the setting they go out. A thermo type is usually known as an inverse time limit relay.

The Court: So that by reason of the distinction you get an instantaneous shut-off when the electro magnetic field has been created.

The Witness: To the setting of the relay.

* * * * * * *

The Court: Objection sustained. Do you know what the maritime regulations are respecting this question?

The Witness: I do.

Q. What are they?

* * * * * * * *

The Witness: For direct current motors under 50 horsepower, 250 per cent of full load current. If it is an instantaneous type relay, if it's a time limit relay it is 150 per cent.

The Court: Say that again slowly. 250 per cent——

[fol. 54] The Witness: Of the full load current of the motor when the relay is an instantaneous type relay.

The Court: And this was an instantaneous type we are talking about?

The Witness: That is correct.

The Court: In other words, it takes 250 per cent of the safe load.

The Witness: Of the full load current of the motor.

The Court: Before it shuts off.

The Witness: Before it trips, yes, and there are reasons for that.

* * * * * * *

The Court: Would you or would you not have to know the maximum load which was to be applied at the end of the cargo runner in order to determine at what setting you would fix the shut off device on your winch?

The Witness: That is done by the manufacturer, yes, your Honor. Given load it is set at 200, up to those capacities, and you see, it is 250 per cent of the motor current. That means that if the motor current is ten amperes it is 250 per cent of ten amperes. If it is 100 amperes it is 250 per cent of 100 amperes.

The Court: If the gear consisting of the topping lift boom and cargo runner are rated at say a three-ton safe load each, at what load should your winch be set to shut off automatically?

The Witness: The motor that matches the three-ton load and the speed has a certain—for a given voltage has a certain amperage, maximum amperage, and it is set—that is normal amperage now, normal full load, not over-

[fol. 55] load, normal load amperage—it is set for two and a half times that amperage.

Now, that translates back to the efficiency of the machine to less at the runner. It is not the two and a half per cent load at the runner because you are losing through the gearing and so forth.

The Court: You mean two hundred and a half per cent.

The Witness: Two and a half times, and you have got—you cannot operate to a hundred per cent because you cannot move the load the hundred per cent.

The Court: For loss of efficiency factor differentiates between the six tons and the four.

The Witness: That plus the acceleration, the accelerating forces that are required you cannot move a three-ton load by applying three-ton to the runner. It will stay there. That is fundamental dynamics—mechanics, I should say.

Q. Mr. Foley, assuming that the electric motor has a rated load of three tons and the cut-off is set at approximately or a little better than six tons or a hundred per cent over the rated load——

A. It is not set on that basis, it is on a basis of 250 per cent of the motor's full load running current.

Q. Well, is not——

A. So that would not be six tons, that would be less than six tons at the runner.

The Court: You have been talking about this winch being set. Do you mean by that, Mr. Foley, that you manually adjust the load under which the device will cut in?

[fol. 56] The Witness: The devices as they come out they have a range, we will say, it is a hundred ampere relay will have a range from—that is normal current is a hundred amperes. They will have a range up to probably 300 amperes, so that at the factory they put full load on the motor with the controller and set the thing to trip. There is an ammeter in the circuit. They put it on a dynamometer, and when it reaches, they just screw the thing up until it is set for 250 and they leave it there.

The Court: And is that the way it stays during operations?

The Witness: During the life of the ship unless they have to repair the controller. When they take the ships in for overhaul they retest them.

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[fol. 57]

Appendix on Behalf of the Respondent-Impleaded Appellant, No. 12,140 and Appellee in Nos. 12,138, 12,139—Filed April 27, 1957

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN H. CRUMADY, Libellant-Appellant,

—against—

JOACHIM HENDRIK FISSER, Her engines, tackle, apparel, etc. and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER, Respondent-Claimant-Appellee and Appellant,

—against—

NACIREMA OPERATING CO., INC., Impleaded Respondent Appellant and Appellee.

TRANSCRIPT OF TESTIMONY (EXCERPTS)

MANUEL COSTA, called as a witness on behalf of the respondent-impleaded, having been previously sworn, testified as follows:

Direct examination.

By Mr. Monigan:

* * * * * * *

Q. Can you show us on the model which is marked R-13 for identification—I guess it is now in evidence, but it still bears the marking R-13 for identification—where on [fol. 58] the model you caused the preventer to be placed on the port boom?

The Court: Step down and show it.

The Witness: The preventer on the model was at least in this position.

Mr. Monigan: The witness indicates on the model a point at the most forward end of the piece of wood which extends

on the port side of the vessel just athwartships from the mast block—I am sorry, with the block at the base of the mast.

The Court: Before you go any further, what about the question of this model being in evidence. Is it in evidence or only for identification?

Mr. Cichanowicz: I do not recall. If it is not in I will offer it.

The Clerk: It is for identification.

Mr. Brass: I am going to object to it. I don't mind it being used for certain purposes, but we have a model here as I pointed out yesterday—it has pad-eyes on this side, the starboard side to the fore of the vessel, and yet has no pad-eyes on the port side opposite the same position.

Furthermore, it would seem to me that this model does not disclose other vital apparatus or positions of pad-eyes that might have been disclosed had we an exact replica of the vessel itself.

Of course, I have no objection to its use, but my only objection of it going into evidence is that this model cannot constitute for the full purposes of all the testimony an exact replica of the vessel.

The Court: Of course, there are a lot of things missing, the scuppers are not there and a whole lot of appurtenances of the vessel are not showing, but it has been used by all parties at this litigation, and I am going to admit it in evidence as demonstrative evidence and it will be marked at this time as your exhibit, Mr. Monigan.

[fol. 59] (Model of ship marked Exhibit IR-5 in evidence.)

The Court: Wait a minute. Whose model is it?

Mr. Monigan: It is not mine, it is the respondent's. It should be R something, because I have considerable concern about some aspects of the vessel as represented on the model which are not——

The Court: How is it marked now?

Mr. Monigan: It is now R-13 for identification.

The Court: Then make it R-13 in evidence.

(Model of ship marked Exhibit R-13 in evidence.)

Q. I notice, Mr. Costa, that the lashing on the model, the preventer, you have it tied around a guy on the foremast. Is that the way it was tied on January 2, 1954?

Mr. Cichanowicz: I object to that. It is leading.

The Court: No, it is not leading. I will overrule the objection.

The Witness: Shall I answer now? The preventer was put in, tied to the pad-eye on the—it had a post from the railing of the ship to the deck and it was sort of a pad-eye on that post.

The Court: The pad-eye was on the post that supported the rail?

The Witness: Yes, and tied to a cleat, and the guy was also on this position.

The Court: When you say this position, do you mean similarly fastened or in the same position as the preventer?

The Witness: No, similar to the preventer.

Q. This model R-13, as I understand your testimony, does not show a pad-eye in the position of the preventer on January 2, 1954, is that correct?

A. It does not. I specified, if the Court remembers when I was here before, that I shifted—well, I was doing it here. I tried to tie it here to the railing of this model, but being [fol. 60] there was no place to secure it, I let it stay in the same position as it was this morning.

Q. Now, do you remember where in respect to the deck the pad-eye was to which the preventer was lashed on January 2, 1954?

A. Pad-eye was almost parallel with the heel block. It would be a foot aft.

The Court: What?

Mr. Monigan: Possibly a foot aft, I believe he said.

The Witness: Yes.

Q. And do you recall where the preventer—do you recall where the guy was placed on January 2, 1954?

A. The guy was placed I would say a foot away from the preventer.

Q. Can you demonstrate on the model the relative position for the guy on January 2, 1954?

A. Yes, I can. This position.

Mr. Monigan: The witness holds the shackle of the guy in a position on the model which is just opposite and to the port of the forward port corner of the No. 1 hatch coaming.

The Court: How far did you say the point of fastening of the guy was from the point of fastening of the preventer in feet?

The Witness: About a foot.

Q. And was there anything on the vessel on January 2, 1954, to which the guy could be attached in the position which you indicate on the model?

A. Yes, it was one of these posts that go from the railing to the deck, and had a hole about I would say an inch and a half in diameter, and we secured the guy with a shackle into this hole on this stanchion that was from the railing to the deck.

Q. Were there any other pad-eyes or shackles on the *Fisser* on January 2, 1954, which are not shown on the [fol. 61] model R-13?

A. Yes, sure. For instance now here on these shackles or pad-eyes as they show here——

Mr. Monigan: Indicating the small vertical piece of wood on the port side of the model.

The Witness: It don't show anything on these—on this position where the preventer should be, and the guy on this particular model it does not show anything.

Q. That there are no——

A. No pad-eyes.

Mr. Monigan: The witness refers to the fact that there is on the model no pad-eye displayed on the small vertical piece of wood which occupies the port side of the vessel from a point forward of the No. 1 hatch coaming to the after portion of the hatch coaming.

Q. Do you recall whether or not there were any pad-eyes or cleats or other deck gear on the port side forward of the vessel on January 2, 1954?

A. If there were any pad-eyes?

Q. Yes.

A. Yes. I recall there were pad-eyes on the vessel.

The Court: In that area?

The Witness: In that area.

Q. And as you examine the model are you able to observe any of those pad-eyes on the port side forward of the vessel except where they are attached to the guys?

A. Well, not here, not on this model, because they did not place any pad-eyes on this particular model. That is why when I testified previous to this I couldn't let the guy and the preventer secure like I do now because there is no place to secure it.

Q. In your experience as a longshoreman, Mr. Costa, have you had an opportunity to observe the pad-eyes, the location of pad-eyes and shackles on vessels of all types [fol. 62] which you have worked in the discharge and loading of cargo?

A. Yes, I had.

Q. On the basis of your observation of such vessels, are you able to tell us whether or not it is usual that the pad-eyes and shackles are the same on the port side of the vessel as are on the starboard side?

A. The same, there is no difference. A pad-eye in all vessels, to rig an up and down boom, a pad-eye is parallel with the heel of the boom pad-eye and the same way on either side, starboard side or port side.

Q. Are booms on vessels that you have observed used alternately, as Burton and up and down booms, depending upon the side of the craft which is moored to the bulkhead or the pier?

A. Yes, that is right.

The Court: Mr. Costa, were the guy and the preventer of the up and down boom secured at the point which you have illustrated on the model when you and the men first went aboard that day?

The Witness: When we first went aboard?

The Court: Were they already in that position?

The Witness: No.

The Court: Who put them there?

The Witness: We did.

The Court: I am referring back to your testimony of March 2nd, in which I understood you to say that at hatch No. 1 when you and the men came aboard the booms were already up and the preventer and the guy was attached.

Now, by whom were the preventer and the guy attached to the location which you pointed out?

The Witness: By the crew of the ship, I suppose, when we went aboard.

The Court: They were already in that position?

The Witness: No, in this position.

The Court: You put them in that position?

The Witness: They were in this position like it is here, like it was before.

[fol. 63] The Court: I am talking now about the position which you have just illustrated with the guy fastened about one foot from the preventer and both points of fastening being on the rail or on the stanchion of the rail at a point abeam of the forward end of the hatch. Did you fasten them there, your people?

The Witness: Yes, we did.

Q. Before the longshoremen put the guy and the preventer in the place which you have designated on the model R-13, and which you have testified about, do you recall the location of that preventer and guy?

A. Yes, I do.

Q. And was the guy and the preventer in the position from which you had it moved when you first came aboard the vessel?

A. Yes, they were.

Q. Now, can you indicate to us by the model where you recall the guy and the preventer were when you first came aboard the vessel on January 2, 1954, to begin work?

A. I can. The guy was more or less in this position here.

Mr. Monigan: The witness indicates the first of the three holes which are on the piece of verticle (sic) wood occupying the port side of the model. When I say first, I mean the first forward of the three holes.

Q. Do you recall where the preventer was when you first came aboard the *Fisser* on January 2, 1954?

A. The preventer was about this area more or less.

Mr. Monigan: The witness refers to the second of the three holes, or the middle of the three holes occupying the vertical piece of wood on the port side of the coaming—I am sorry, the port side of the vessel.

Q. Why did you move the guy, why did you have the guy and the preventer moved from the position which you [fol. 64] have indicated was their position when you came aboard the ship, to the position which you have indicated you caused them to be moved before your operations began?

A. Well, as a practical procedure on the ships, when we go on ships we usually find the booms up, then we have to trim the booms the way we are going to discharge the ship. We load, of course, on this particular ship we are not allowed to lower the booms. We were allowed to trim the booms either way we wanted. So in order to work we got to place the guy and the preventer in this position so you can have the right lead when you discharge a ship.

Mr. Monigan: The witness indicates a position for the guy, the same position which he had indicated as the position to which he had moved the guy before operations began.

The Witness: In other words, if I were to leave the preventer stay in this position.

Mr. Monigan: Indicating the middle hole on the vertical piece of wood on the port side of the model.

The Witness: When I started work this preventer would be useless, it would not be any good. It wouldn't hold the boom in the position that I wanted the boom to be, because by having it leaning aft and when the Burton boom takes the strength on both runners, this boom will swing toward the middle of the hatch by having her in this position here.

Mr. Monigan: Indicating the position in which the preventer was rigged when he first came aboard the vessel.

The Witness: By having her like we always do, by my practical experience it would not move, it stays in that position all the time.

The Court: And the purpose of placing it in the position in which you placed it was to overcome the pull in the direction of the center of the hatch, is that right?

[fol. 65] The Witness: That is correct.

The Court: To counteract the pull?

The Witness: Yes.

Q. Now, on January 2, 1954, are you certain that you had before you began the work, the preventer and the guy

in the position which you have demonstrated you had it moved to on the model?

A. Yes, I am certain of that place.

Q. Has your experience as a longshoreman indicated to you the desirable or the safe place to put guys and preventers on the discharge of cargo?

A. Yes, some practices in some ships because we have this boom say in this position way up here.

Mr. Monigan: Indicating the position of the boom closer to the mast than that indicated in the model.

The Court: With the boom making a smaller angle at the mast—with the mast.

Q. What is the effect of that?

A. Then when the boom is in a smaller degree, then we have to have either the guy or the preventer in this position so the boom won't jack-knife against the mast.

Q. But on January 2, 1954, did you have anything to do with the setting of the boom?

A. Yes—not the setting of the boom.

Q. So far as the topping lift is concerned?

A. No, we didn't touch that.

Q. And from your experience as a stevedore is there anything about the relationship to the location of the preventer with relation to the guy which is important in the discharge of cargo?

A. Well, we consider the guy and the preventer just as valuable on discharging the cargo. The reason why they make these is for the deckmen, when they rig the boom they usually pull on this. It has got four parts on it and the boom swings quicker. But as far as fastening this we put [fol. 66] just as much strength on the guy as we do the preventer. As a matter of fact, at times we put a little more strength on the guy so when we put the weight on the boom, the rope gives a little bit, and then the preventer takes over and there will be similar strength on the guy and the preventer.

The Court: Are both the guy and the preventer made of wire rope?

The Witness: The guy is made of a rope, coil rope.

The Court: Manila rope?

The Witness: Yes.

The Court: And the other is made of wire?

The Witness: Yes, the preventer is made of wire.

Q. Is all of the guy always made of manila rope or is there any portion of it which is sometimes made of manila rope?

A. The pennant.

Q. And by the pennant do you indicate that portion of the guy which is between the head of the boom and the ship?

A. That's right.

The Court: Was that the case on this vessel that day?

The Witness: Yes, it was the case. The pennant on this ship was made of wire. The pennant on the guy was made of wire.

Mr. Brass: I think the photograph substantially indicates that it shows the guys.

Cross examination.

By Mr. Cichanowicz:

Q. Mr. Costa, when you came aboard the ship you were told not to move the booms; is that correct?

A. Not to raise or lower the booms.

Q. The only instructions you were given were not to raise or lower the——

[fol. 67] Mr. Monigan: If your Honor please, I think again we are going beyond the scope of the direct examination of this witness. It is addressed to the testimony of the witness at earlier appearances that he made in the matter.

The Court: I will overrule the objection, because my recollection is that he said on direct that he trimmed the boom and changed the position of the guy and the preventer, and then he discussed the propriety of different positions depending upon the angles formed by the boom with the mast. I will permit the question.

The Witness: Given by the Mate not to lower it or raise the boom.

The Court: And you could trim the boom without raising or lowering it, couldn't you?

The Witness: Yes.

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By the Court:

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While you are examining the record—Mr. Costa, do you remember when you were here on the stand back on the 2nd of March of this year?

The Witness: I remember.

The Court: Do you recall whether you illustrated then what you have illustrated today respecting the position of the preventer and the guy of the up and down boom?

The Witness: I do.

The Court: On the model.

The Witness: The same way as I did today.

The Court: You did it then the same way as you did it today, that is your recollection?

The Witness: Yes.

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[fol. 68]

Appellee's Appendix in No. 12,139—Filed May 23, 1957

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN H. CRUMADY (Libellant), Appellant in No. 12,138,

—v.—

JOACHIM HENDRIK FISSER, Her Engines, Tackle, Apparel, etc. and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER (Respondent-Claimant), Appellant in No. 12,139,

—v.—

NACIREMA OPERATING CO., INC. (Impleaded Respondent).

TRANSCRIPT OF TESTIMONY (EXCERPTS)

DR. HERMAN LOWMAN.

Direct examination.

Q. What are your terminal findings? When did you see him last and what were your terminal findings?

A. February 29, 1956, in my office. At that time patient walked with a marked left sided limp with a cane. Without a cane he cannot walk more than several feet. He walks with the left foot placed flatly on the floor with no spring. The back brace that he wears was removed and this showed mark(ed) wear. On standing erect it was noted that there was a moderate right dorso lumbar scoliosis with obvious spasm grossly and on palpation of the left lumbar muscles.

There was marked flattening of the normal lumbar curve. Forward flexion of the trunk was possible until the fingertips were about twelve inches from the floor. In performing this motion he does it slowly and in apparent pain. There is incomplete reversal of the lumbar spine in doing this. He hyper extends his spine slowly with about a 5-degree loss. There is about 5 to 10 degrees loss of right

and left lateral flexion of the trunk. He also performs these motions slowly and painfully.

The left side of the pelvis appears higher when he stands. In a sitting position there is a moderately positive Lewin test bilaterally.

The Court: What is that?

The Witness: The Lewin test is performed with the patient sitting with the feet hanging over the edge of the examining table and the examiner passively extends his knee, and in case of spasm or any disorder of the back, [fol. 69] the patient limits the extension of the knee because of pain.

He complains of pain of the entire lower spine in performing this test. In the supine position, straight leg raising is restricted on the right leg for about 30 to 40 degrees and on the left leg for 40 degrees.

With his knees flexed there is further flexion possible in the hips, but he still complains of pains in the entire low back area.

There is a moderate loss of abduction of both hips, slightly greater on the left. There is a moderate loss of inversion and eversion of both hips, slightly greater on the left.

He complains of some tenderness in the lower abdomen on both sides. There is also marked tenderness on pressure over the symphysis pubis. He complains of pains in this area on lateral compression of both sides of the pelvis.

Leg measurements are equal. In lying supine it is noted that he holds the left side of the pelvis higher than the right. The left calf measures three-quarters of an inch smaller than the right in circumference.

The Court: What was that again?

The Witness: The left calf. The left ankle measures one-half inch greater in circumference than the right. There is a healed puckered scar still visible on the lateral aspect of the ankle. The left foot is held in slight valgus position. There is marked restriction of motion in the midtarsal joints of the left foot. There is a 15-degree loss of dorsal and 15 degrees loss of plantar flexion of the left ankle.

There is some residual stiffness of the toes of the left foot. He complains of some tenderness in the upper lateral aspect of the right calf.

In the prone position, the previously mentioned spasm is again noted in the left lumbar muscle group. There is [fol. 70] marked tenderness in this area. In addition there is tenderness of the right lumbar muscle group and over both sacroiliac areas. He is likewise tender over the lumbosacral region of the spine.

The Ely-Nachlas test are moderately positive. Loss of rotation of both hips is easily demonstrable in this position.

Q. What was your conclusion?

A. Well, it is my feeling and still my feeling, as it has been in the past year, that this patient is totally disabled, permanently. I feel his condition is stationary in respect to his spine and pelvis. I note here that it should be noted that he has increased loss of motion in both hips. I feel this may indicate a progression of disability in both hip joints. I feel his left ankle is progressing poorly and that he requires an ankle fusion to diminish his pain and possibly help his gait.

CAPTAIN PETER PETERS.

Direct examination.

Q. Wasn't the burden at which the safety device would shut off the winch—being six tons according to your testimony—twice as great as the safe working capacity of the boom?

* * * * * * *

The Witness: Yes, six or more.

Q. And wasn't the safe or the burden at which the safety device on the winch would shut off twice as great as the safe working load of the runner?

A. Yes.

[fol. 71] Q. And wasn't the burden at which the safety device of the winch would shut off twice as great as the safe working load of the topping lift?

A. Certainly twice. It is too technical.

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ROBERT ALLEN SIMONS.

Direct examination.

* * * * * * *

Q. And is there any factor prescribed for safe practice in the function of the electric cut-off device in electric winches so far as you are aware?

Mr. Cichanowicz: This is repetitious. I believe it has been covered.

[fol. 72] The Court: Was that not what he said three times?

Mr. Monigan: I believe that is related to the amount of current which goes through the winch rather than the load.

The Court: You mean by government authority?

Mr. Monigan: In relation——

The Court: Prescribed by government authority.

Mr. Monigan: By any authority that he knows.

The Court: Is there or is there not? The objection is overruled.

The Witness: Well, yes, as far as I have said in controlling the current you are controlling the load.

The Court: Will you enlighten me a little bit on that. You say in controlling the current you are controlling the load. What actuates this cut-off device, an excess of current?

The Witness: To the motor, that is correct.

The Court: And that is measured in amperes, is it?

The Witness: That is correct.

The Court: How do you relate the excess of current to be an excess of current to an excessive load?

The Witness: The greater the current applied to a motor, and therefore applied to the winch, the more horsepower and torque the motor will have and, therefore, the more pull on the load or on the hoist wire. In other words, the greater the current that goes through that motor, the more power you are supplying to the motor, and the more power you are going to get out of that motor, and the more lift from the motor.

The Court: What ultimately shuts the current off is the resistance to that horsepower of the motor, is it not, to be found in the load which is being hoisted?

[fol. 73] The Witness: That is correct.

The Court: So that if you try to pull the bottom of the ocean up you would reach a point where your motor would shut off if the shut off device was functioning?

The Witness: That is correct.

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Q. Is there a standard procedure or standard practice so far as the integration of a winch which is capable, which has a cut-off at six tons with gear which is designed to bear a load of three tons in its component parts?

A. I don't know if there is a set printed standard or a set standard, if you mean by that a printed standard.

Q. Is there any sound engineering practice of which you are aware in the design of ship's cargo equipment which considers the integration of those factors recited to you?

A. Yes.

Q. Is there a prescribed method of design of such factors?

A. Yes, according to the design departments I have been in, we are always considering it good practice to set or to have the cut-off shut the winch off at around fifty per cent or less of the load.

Q. And why is that safe practice?

A. It is safe because if a rig is designed, we will say, for three tons and you apply six tons on the end of a hook because you were doubling the load, you are not necessarily just doubling the load in the topping lift twice—I mean doubling the load in the topping lift, you might be making it ten times with the vang or preventer in certain positions. Therefore, a rig designed for three tons should never be operated lifting six tons.

• • • • • • •

Cross examination.

[fol. 74] Q. Did I understand you to say that it is not safe practice to have a runner with a safe working load of three ton, a boom with a safe working load of three-ton, a topping lift with a safe working load of three-ton, and a winch which has a shut-off device of the current at six-ton or better?

A. I did not say that.

Q. What did you say?

A. I said that it is not safe practice to have a rig that was designed for three tons working load and of the winch with a cut-off set at six tons so that you could apply six tons load to the hoist before the winch would cut off because that would be doubling the load for which the rig was designed for.

* * * * * * *

WALTER J. BYRNE.

* * * * * * *

[fol. 75] Cross examination.

Q. On what do you base your familiarity with the end result of cut-offs on electric winches?

A. Well, if you have three-ton gear and a three-ton winch and due to cut-offs in back, you allow, let us say, a hundred per cent overload to be developed, then I think from my point of view as a safety man you are taking away a governor. You are taking away something which is built in for the protection of the gear and personnel.

[fol. 76]

Libellant's Supplemental Appendix—Filed June 21, 1957

In United States District Court
For the District of New Jersey

John H. Crumady (Libellant), Appellant in No. 12,138,

v.

Joachim Hendrik Fisser, Her Engines, Tackle, Apparel, etc. and Joachim Hendrik Fisser and/or Hendrik Fisser (Respondent-Claimant), Appellant in No. 12,139,

v.

Naciremа Operating Co., Inc. (Impleaded Respondent).

Transcript of Testimony (Excerpts)

Hermann Buss, called and sworn on behalf of the respondent, testified as follows:

Direct examination.

By Mr. Cichanowicz:

* * * * * * *

Q. And did you inspect the after end of the second piece of timber?

A. Then I inspected it.

Q. And what did you see when you inspected that after end of the timber?

A. That there was a dent at the upper part of the after end at the timber.

Q. About how long was this dent?

A. It was about a foot.

* * * * * * *

Q. Now, did you also run the winch? [after the accident]

A. Yes, sir.

Q. When was it; the first time, the second or the third time?

A. That was the first time.

Q. And what did you do before you ran the winch, if anything?

A. I just wanted to start the winch. I wanted to start the winch. To do that, I had to go to the fore end of the mast, the locker end of the mast.

[fol. 77] Q. Why did you go there?

Mr. Monigan: Objected to, if your Honor pleases. A conclusion on the part of the witness. What purpose was served in that respect is purely a conclusion.

The Court: I overrule the objection. Why did you have to go there?

The Witness: To start the engine. The starter is in this locker of the mast.

The Court: The starter is in what?

The Witness: In the locker of the mast.

The Court: All right.

Q. What kind of starter is that in the mast?

A. That is an electric starter.

The Court: A switch?

The Witness: No, sir. That's an electric starter. That's the same they use in America, the same word for it too. I can show you by a picture to make it understandable, how a thing like that works.

The Court: Have you got one?

The Witness: No. A couple of rheostats it is; a big rheostat.

The Court: That's what you call a starter?

The Witness: That's a starter.

The Court: And I think we all understand that a rheostat regulates the degree of current that is applied. All right.

Q. Now, after you did that, then you went over to the winch?

Note—The page numbers of this Supplemental Appendix continue on from the end of "Appellee's Appendix in No. 12,139."

A. Then I went over to the winch.

Q. And what did you do?

A. Just pushed the lever ahead and back to show him that things are working properly.

[fol. 78] The Court: Now, captain, tell me this for my information. When a winch operates or a man uses the winch, does he have to do anything with the rheostat?

The Witness: Nothing at all. He has only this lever, to push it ahead for lifting. For stopping, he has up and down. For lowering with a weight on it, he has to put it a little bit back. If there is no weight, he has to push it farther back. And that's all he has to do.

The Court: Now, before this boom fell, it was being used, wasn't it?

The Witness: The whole morning.

The Court: Why was it necessary for you to do anything to the rheostat in the locker at the base of the mast?

The Witness: This main switch was shut off by getting too much current. It is switching out at six tons, and then it jams out, and then you have to push it again and start the whole business again.

The Court: So that the shutting-off device, the operation of the shutting-off device, requires the replacement or readjustment of the rheostat, is that correct?

The Witness: Yes, sir.

. . . . . .

Q. Do you know at what point the cut-off or overload device was set?

A. In our boat, at a hundred per cent plus.

Q. Plus what?

The Court: A hundred per cent of what?

The Witness: Above the ordinary amount the motor takes.

The Court: In other words, twice the capacity?

The Witness: Twice the capacity.

. . . . . .

[fol. 79] Q. Well, after the accident, Mr. Buss, did you go into the mast house locker or the mast table locker? Did you go in?

A. I can't go in. That is a locker that big, about.

Q. You went to the mast block?

A. I went that afternoon when Captain Axiodes and the others that were on board, they wanted me that I start the winch, Mr.—I forget his name.

The Court: Grundvig?

The Witness: Grundvig. And so I had to go to the mast locker and when I wanted to start that winch I found out that the button was jammed out of this cutting shut-off device.

* * * * * * *

The Court: And can you throw out the interrupting device by hand?

The Witness: No. Then we have to unscrew the whole stuff, you see. You use about a quarter of an hour's work.

The Court: And if there is no tension on the wire around the drum of the winch, is it possible for the interrupting device to go out?

The Witness: No.

* * * * * * *

Q. Captain, when you went to the mast, the locker and mast table in the afternoon at about 3 o'clock on January 2nd, what did you find with respect to the overload device?

A. I first looked at my switch at the winch, if she was in the correct direction for starting, and then I started the hand wheel and the hand wheel slipped back, and so I see that there was no current on it. Then I looked over at the powering device there and switched it in.

The Court: Was it out?

[fol. 80] The Witness: It was out. If there is no current this big hand wheel——

The Court: Show me the hand wheel.

The Witness: Here.

The Court: That is on the rheostat.

The Witness: If there is no current flowing. Here is the little electric coil with a hook which holds it in the end position and as long as there is no current flowing it jumps back, then I found it out and then I looked to see

on this locker mounted on the side. Then you just have a little black button that is looping out and you push it in.

Q. You say that this could not be turned off by anybody else at any time?

A. No.

* * * * * * *

The Court: I can understand things better from seeing them than from hearing them described. While he is getting that tell me this: When you at 3 or 3:30 tried this winch and found this interrupting device was out——

The Witness: I pushed it in with the finger.

The Court: And when you pushed it back in were you able to operate the winch?

The Witness: Then I tried the handle again, you see, and then it worked. From the forepart of the mast you cannot hear if the winch is working but if it stays there, the big hand wheel, then it shows that the winch is working full speed.

* * * * * * *

[fol. 81] Isaac Stewart, called as a witness in behalf of the respondent, having been previously sworn, testified as follows:

* * * * * * *

Cross examination.

By Mr. Morgan:

* * * * * * *

Q. * * * In order for your calculations to have been made, was it necessary for you to make an assumption as to the amount of strain that was on the cargo runner?

A. Oh, yes.

Q. Your conclusion was based upon the hypothesis that there was a three-ton strain on the cargo runner, is that correct?

A. It was based upon the fact that there was a three-ton rated boom and therefore I used that.

Q. If in fact there was not a three-ton strain on the cargo runner your calculations would necessarily be different, would they not?

A. They would be modified, yes.

Q. I believe that you testified that if the position of the cargo runner to the sling were different from your assumptions in that respect your calculations would likewise vary, isn't that so?

A. That is correct.

* * * * * * *

Q. Are there any assumptions in the hypothesis which you were given which are not represented on IR-4 for identification in those drawings?

A. Yes, I do not indicate on these drawings the loading conditions that were used in connection with the calculations.

Q. That is the weight on the cargo runner?

A. That is right.

Q. What else does IR-4 fail to disclose other than that?

[fol. 82] A. I don't have the vertical height of the mast marked on here.

Q. What assumption did you make in respect to the vertical height of the mast?

A. I didn't give that in the course of my calculations. I am sorry, I misinterpreted your question. I did not use that in the course of my calculations.

Q. You did not consider the height of the mast for your calculations?

A. No, I did not use them.

Q. Are there any items of assumption which you made in making your calculation which are not represented on IR-4 for identification, except the weight on the cargo runner which you just mentioned?

A. Yes, I made an assumption of the stress due to the boom and rigging which is marked on the board as gear, assumed stress of a thousand pounds.

Q. That is the total weight of the boom and gear of a thousand pounds which you made?

A. No, no, the stress created by the weight of the boom and gear in the topping lift cable.

Q. Your thousand pound assumption was not weight of gear?

A. No, it is a stress.

Q. Stress resultant from the weight of gear?

A. That's right.

Q. What assumption did you make in respect to the weight of the gear itself?

A. Well, I did not make any assumption regarding the weight of it. I just took a value of a thousand which is negligible, and just put it in to indicate that I did not overlook that.

. . . . . .

By Mr. Brass:

Q. Does the safe working load of a wire rope decrease with heavy usage?

[fol. 83] A. If wires are broken or damaged within the rope then it will reduce once they exceed the specified number. In every one of these instances the ultimate strength of the rope is affected.

Q. Does the safe working load of a wire rope decrease with the manner in which it is exposed to weather conditions?

A. I will have to answer that the same way. If the wires are broken it is removed from service, the ultimate strength will be decreased.

Q. So that the only way you can determine whether or not a wire has a lesser safe working load than when it was new is by determining whether or not any of the wires are broken?

A. That is correct.

Q. And how do you determine while the rope is in use whether or not there are any wires in the interior of the rope that are broken?

A. The wires on the exterior are the ones that break.

Q. And the wires on the interior do not break at all?

A. Generally they do not, the exterior wires being subject to the greater forces are the ones that are broken first.

The Court: May I interrupt you a moment, Mr. Brass? While we are still on this safe working load, did I under-

stand you to say that the safe working load of a wire rope is one-fifth of its tensile strength?

The Witness: Breaking load, yes, that is, a new rope.

The Court: Now as the deterioration increases in the wire rope the breaking load decreases, does it not?

The Witness: That is right.

* * * * * * *

[fol. 84] MANUEL COSTA, called as a witness on behalf of the respondent-impleaded, having been previously sworn, testified as follows:

Direct examination.

By Mr. Monigan:

Q. Do you recall on January 2, 1954 what if anything you did with respect to—you did or had done at your direction with respect to the preventer on the port boom of the Fisser?

* * * * * * *

The Witness: I do.

Q. Can you show us on the model which is marked R-13 for identification—I guess it is now in evidence, but it still bears the marking R-13 for identification—where on the model you caused the preventer to be placed on the port boom?

The Court: Step down and show it.

The Witness: The preventer on the model was at least in this position.

Mr. Monigan: The witness indicates on the model a point at the most forward end of the piece of wood which extends on the port side of the vessel just athwartships from the mast block—I am sorry, with the block at the base of the mast.

* * * * * * *

Q. I notice, Mr. Costa, that the lashing on the model,

the preventer, you have it tied around a guy on the foremast. Is that the way it was tied on January 2, 1954?

Mr. Cichanowicz: I object to that. It is leading.

The Court: No, it is not leading. I will overrule the objection.

The Witness: Shall I answer now? The preventer was put in, tied to the pad-eye on the—it had a post from the [fol. 85] railing of the ship to the deck and it was sort of pad-eye on that post.

The Court: The pad-eye was on the post that supported the rail?

The Witness: Yes, and tied to a cleat, and the guy was also on this position.

The Court: When you say this position, do you mean similarly fastened or in the same position as the preventer?

The Witness: No, similar to the preventer.

Q. This model R-13, as I understand your testimony, does not show a padeye in the position of the preventer on January 2, 1954, is that correct?

A. It does not. I specified, if the Court remembers when I was here before, that I shifted—well, I was doing it here. I tried to tie it here to the railing of this model, but being there was no place to secure it, I let it stay in the same position as it was this morning.

Q. Now, do you remember where in respect to the deck the pad-eye was to which the preventer was lashed on January 2, 1954?

A. Pad-eye was almost parallel with the heel block. It would be a foot aft.

The Court: What?

Mr. Monigan: Possibly a foot aft, I believe he said.

The Witness: Yes.

Q. And do you recall where the preventer—do you recall where the guy was placed on January 2, 1954?

A. The guy was placed I would say a foot away from the preventer.

Q. Can you demonstrate on the model the relative position for the guy on January 2, 1954?

A. Yes, I can. This position.

[fol. 86] Mr. Monigan: The witness holds the shackle of the guy in a position on the model which is just opposite and to the port of the forward port corner of the No. 1 hatch coaming.

The Court: How far did you say the point of fastening of the guy was from the point of fastening of the preventer in feet?

The Witness: About a foot.

Q. And was there anything on the vessel on January 2, 1954, to which the guy could be attached in the position which you indicate on the model?

A. Yes, it was one of these posts that go from the railing to the deck, and had a hole about I would say an inch and a half in diameter, and we secured the guy with a shackle to this hole on this stanchion that was from the railing to the deck.

Q. Were there any other pad-eyes or shackles on the Fisser on January 2, 1954, which are not shown on the model R-13?

A. Yes, sure. For instance now here on these shackles or pad-eyes as they show here——

Mr. Monigan: Indicating the small vertical piece of wood on the port side of the model.

* * * * * * *

Robert Allen Simons, called as a witness in behalf of the Respondent-Impleaded, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Monigan:

Q. Where do you live, Mr. Simons?

A. 332 Maplewood Drive, Paramus, New Jersey.

Q. What is your business or profession?

A. I am head of the scientific section at M. Rosenblatt & Son, Naval Architects and Marine Engineers.

[fol. 87] Q. Where is M. Rosenblatt & Son located?

A. 111 Broadway, Manhattan.

Q. And what education have you had?

A. Bachelor of Science in naval architecture and marine engineering from the University of Michigan.

Q. What year did you graduate?

A. Spring of 1948.

Q. And since the spring of 1948 what has been your profession or occupation?

A. I have been an engineer in various shipyards, a merchant seaman on board a tanker, a designer of various types of vessels, and all types or various types of cargo handling systems.

* * * * * * *

Q. Have you ever had occasion to design a topping lift which is in two parts and which comprises five-eighths inch diameter galvanized mild plough steel wire rope to be combined with a cargo runner of seven-eighths inch diameter?

A. Definitely not.

Mr. Cichanowicz: I object to that. I think this has absolutely no relation to this vessel. This is very general testimony. There is no showing here that that is a matter which is pertinent.

The Court: He will relate it more specifically I think to all other types of vessels. I will overrule the objection.

The Witness: I have some figures on the size of topping lifts here. Well, your question was whether you——

The Court: You say, Mr. Simons, that you have never designed a topping lift which was less in diameter than the cargo runner?

The Witness: That is correct.

Q. And why is that?

[fol. 88] A. Because the number of parts would be too great in the topping lift to make a clean cut in an efficient design, the more parts you have in a topping lift the less efficient the rig is. Therefore you have to increase the size of your wire rope in order to increase the efficiency of the topping lift system.

Q. In your experience, is it standard practice to design

a two-part topping lift of five-eighths inch diameter wire to be used with seven-eighths inch diameter wire?

A. Not in my experience.

Mr. Cichanowicz: Is this referring to German vessels or is this referring to American ships?

The Witness: It refers only to the——

Mr. Cichanowicz: If it is referring to this type of vessel or other types of vessels—there are various types of vessels.

The Court: The objection will be overruled.

Q. Why is that not standard practice in your opinion?

A. Because——

The Court: Just a minute, Mr. Monigan. You say standard practice in his opinion. Is that a matter of opinion or a matter of fact?

Mr. Monigan: Suppose I reframe the question.

Q. Do you know, Mr. Simons, why that is not standard practice?

A. Yes. The reason for that is that you would need more parts or more numbers of a greater number of wires in the topping lift to make up for the lack of size in the wire, and, therefore, more sheaves in the blocks, and you have less efficiency in the rig because there is more friction in the sheaves.

Q. And in order for it to be standard practice to have a smaller diameter of wire comprising a topping lift with a larger diameter cargo runner wire is that it must be done with more parts of the topping lift?

[fol. 89] A. Yes, that is correct.

Q. So that a two-part topping lift of a five-eighths inch diameter is not standard practice in relation to a seven-eighths inch cargo runner, is that correct?

A. That is correct in my experience.

The Court: When you say two-part topping lift, does this model which is before us exemplify a two-part topping lift?

The Witness: That is correct.

The Court: And that is because there are two wires

running horizontally from the masthead to the boom head, right?

The Witness: That is correct.

• • • • • • •

Q. Have you had any experience so far as the automatic cut-off device in electric winches is concerned?

A. Yes.

Mr. Cichanowicz: I object to that. This man says he has no experience with electric winches.

The Court: That was my understanding.

Mr. Monigan: I think the witness was misunderstood. I just asked him this question to which he responded yes.

Q. What has been the nature of your experience in respect of automatic cut-offs on electric winches?

A. Well, in the design and surveying on board ship we have had to design rigs with innumerable electric winches, and I personally have never specified what the cut-off on a winch should be, but I have learned through experience what they generally set the cut-off on winches at.

Q. That is electric winches?

A. Yes.

Q. So far as you are aware, is there any standard practice in respect of the design of automatic cut-offs in electric [fol. 90] winches so far as the time at which the automatic cut-off device will operate?

A. Well, generally speaking in the field, I have found, and I have talked with many winchmen in the field, and I have talked to engineers in my own scientific section and other shipyards, and it all indicates that the cut-off should be around fifty per cent or less on a winch. I have never heard of a hundred per cent.

Mr. Cichanowicz: I move to strike out this testimony. It is hearsay.

The Court: Why is it not (sic) hearsay?

Mr. Cichanowicz: He said he had talked to engineers, he had talked to this person and that person. He had heard that this is what it is. It is not based upon his own experience or his knowledge. It is based upon something else that someone told him.

The Court: How about his particular experience in the field of winch design operation and function?

Mr. Cichanowicz: He testified that as far as that was concerned he did not have any particular knowledge or experience. This was based upon things that he got from other people.

The Court: Yes, I am going to sustain the objection. I am going to grant your motion to strike out. You may approach it in a different way, Mr. Monigan.

Q. What has been your experience so far as the knowledge of the existence of automatic cut-offs in electric winches?

A. Only what I have learned talking to the men that sell winches, the men that design the electrical circuits for winches in the engineering field.

Q. In the course of your work in designing and working as a naval architect, have you had occasion to rely upon the information with respect to automatic cut-offs in electric [fol. 91] winches that you have learned by your experience and the discussions which you have told us about?

A. Yes.

Q. Is there a standard practice so far as you know prescribing an automatic cut-off on electric winches?

A. Well, it is generally around fifty per cent overload and the winch cuts out.

Mr. Cichanowicz: I object again. This is just a method of getting around the other.

The Court: The unfinished answer will be stricken.

Mr. Cichanowicz: The other objection——

The Court: See if we cannot clear this thing up. Do you know how these automatic cut-offs work, Mr. Simons?

The Witness: I have a general knowledge of how they work.

The Court: Well, can they be set to work under different loads?

The Witness: Absolutely.

The Court: Then there is no fixed design of the cut-off mechanism of an electric winch aboard ship which precludes its setting at a variety of cut-off stages, is there?

The Witness: Well, the Maritime Commission has certain maximum amounts of current that they specify you cannot exceed. You cannot exceed a certain current in the setting. Outside of that I myself know of no special setting except what is considered good practice in the field.

The Court: But that setting is a matter that can be controlled by the person who is in control of the winch at the particular moment, is that right?

The Witness: I know of no case where that has occurred. It is the electrician that sets the cut-offs when the winch [fol. 92] is installed, and if any change is made in it, the electrician of the ship or some competent electrician has to make the change in the cut-off.

The Court: I do not word it accurately. In other words, it may be changed by ship's personnel if he is competent as an electrician?

The Witness: Yes.

* * * * * * *

WALTER J. BYRNE, called as a witness in behalf of the respondent-Impleaded, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Monigan:

* * * * * * *

Q. Now, based upon the hypothesis that the preventer was located in a different position from that assumed in the hypothesis given to Mr. Stewart, did you make any calculations?

A. I did.

Q. And in those calculations what position did you assume for the existence of the preventer?

A. I led the preventer back opposite the heel of the boom.

Q. And were you present when Mr. Costa testified yesterday?

A. That is correct.

Q. Did you observe the position of the preventer which

he indicated it occupied before discharge and he placed the place on the model where that preventer was located?

A. Yes, from a seat back there I did.

Q. Have you prepared a diagram based upon that assumed location of the preventer along with the remaining rig?

[fol. 93] A. I have.

Q. What computation of forces did you arrive at on the several gear comprising the topping lift cargo runner and sling?

A. On the basis of the preventer lead back opposite the heel block I calculated the topping lift stress to be 8400 pounds.

Q. Do you have any opinion based upon your experience as a stevedore safety consultant of whether or not a location of the preventer in that assumed position with respect to the rest of the rig was safe or unsafe?

A. It was safe, and in this instance in my opinion it was all the more reason to be put back there because of the size of the topping lift.

Q. What effect would the size of the topping lift have upon the desirability of the location of the preventer as indicated by Mr. Costa?

A. Well, my experience is that a topping lift relatively speaking with the other parts of the gear is usually the strongest part of the whole system, and in there are certain situations where if the boom were placed in a certain position and with the other factors involved, that it might be advisable or indicated to make a slightly different type of preventer lead. But in this case where the topping lift is somewhat limited in its strength, the best possible way to strengthen that topping lift is to get some work and help out of the preventer which is led back to the heel which is in this instance it actually does. It helps the topping lift.

The Court: In other words, the compensation for any inadequacy of the topping lift cross section.

The Witness: That is correct.

Q. Based upon the assumed location of the preventer which was testified to by Mr. Costa, have you any opinion

concerning the cause of the parting of the topping lift on January 2, 1954?

[fol. 94] A. Based upon——

The Court: Let us answer that yes or no first.

The Witness: Yes.

Q. What is that opinion?

A. Based upon my calculations it is my opinion that the topping lift wire must have been defective.

Q. Do you have with you your calculations which you have made on the basis of the hypothesis of the location of the preventer as testified to by Mr. Costa?

A. I do.

Q. In the course of the preparation of those data did you make any assumption concerning the location of the boom in relation to the center line of the ship?

A. I located the heel of the boom two-foot off center and I located the head of the boom, if you drop a plumb line, two feet off the outboard of the coaming and along the center of the hatch.

Q. And did such calculations materially differ if you have an assumed location for the head of the boom of five feet from the center line?

A. The head of the boom?

Q. I am sorry, the back of the boom.

A. In this instance with this you might say it (sic) a complicated vector angle problem. There are certain things which compensate for each other and it would be very little differential in the end result with that difference in the location of the heel of the boom off center.

Q. To your analyses that you have testified about, do they contain both assumed locations for the boom?

A. I do not have both.

Q. The one that you have is predicated upon what location?

A. A two-foot off center—off the center line of the ship for the heel of the boom.

[fol. 95] The Court: You have two cargo booms on the same mast to serve the same hatch. Is it usual—unusual that each heel is off center slightly?

The Witness: Yes.

Mr. Monigan: I offer these analyses prepared by Mr. Byrne. Perhaps it could be admitted on the same basis that the other diagrams on the vessel's case were submitted.

The Court: How about that?

Mr. Cichanowicz: Yes.

The Court: It will be marked, subject of course, to explanation on cross-examination.

(Analyses marked Exhibit IR-8.)

The Court: Mr. Byrne, will you give me as succinctly as you can the chain of reasoning which brings you to the conclusion that the topping lift, in the case with which we are here concerned, must have been defective and that was the cause of the falling of the boom.

The Witness: Well, your Honor, in the analysis as used in the hypothetical problem originally as set forth by counsel and as analyzed by Mr. Stewart and making one change the leading back of the preventer to a position opposite the heel block, the entire stress picture changes. The end result for the topping lift comes out at the safe working load of the topping lift which is—and also far below the breaking strain, and for that reason I cannot come to any other conclusion than the fact that the wire must have been defective.

The Court: In reaching that conclusion, Mr. Byrne, have you taken into consideration the specific load at the sling?

The Witness: Yes.

[fol. 96] The Court: Upon what facts do you——

The Witness: I predicated the pull again on what I have read, counsel set up a hypothetical example of a three-ton pull, and I used that three-ton pull in the determination.

The Court: So that I, who am a landlubber, can understand all this marine—I was going to say jargon, but let us say terminology—when you say a three-ton pull, are you assuming that there was a load of three tons on the sling?

The Witness: Yes, a load—a pull of three tons of cargo runner.

The Court: All right. Of course, if that pull on the cargo runner was greater than three tons would your

opinion be different, if as a matter of fact that pull on the cargo runner, was greater than three tons?

The Witness: If the pull on the cargo runner was greater than three tons everything else would change, that is correct.

. . . . . .

Q. What in your opinion is the effect of a hundred per cent overload on a cargo runner in connection with gear which has a three-ton capacity safe working load?

The Court: Is there any objection?

Mr. Cichanowicz: I object to that question. I object to the form of the question, the overload on the gear. I do not know what he is talking about, frankly. Is he talking about——

The Court: By gear, I take it you mean the cargo runner?

Mr. Monigan: The cargo runner and the remaining wire components of the freight.

The Court: Is that satisfactory to you?

[fol. 97] Mr. Cichanowicz: Yes.

The Court: Have you the question?

The Witness: The effect.

The Court: Yes, of a hundred per cent overload on gear having a safe working load of three-ton.

The Witness: It could be drastic.

Q. Why do you say that?

A. Well, that leaves open the opportunity of going beyond the limits of the gear. In other words, you might think of it as a governor or a safety valve that is missing. If you allow a hundred per cent overload to be applied, that is why.

Cross examination.

By Mr. Cichanowicz:

Q. Mr. Byrne, what is the factor of safety on a runner?

A. Five.

Q. Five what?

A. In order to determine the safe working load you divide the breaking strength by five.

Q. In other words, the safety—the safe working load——
A. Is one-fifth.
Q. And if you say it is a hundred per cent over the safe working load it is a drastic condition. Is that what you are testifying to now?
A. Yes.

. . . . . .

Q. In other words, you say it is drastic even though the safe working load is one-fifth of the breaking load, is that right?
A. That is correct. I am a safety engineer. One pound over the safe working load in my opinion is bad.

. . . . . .

[fol. 98] The Court: While you are thinking of the form of your question, let me ask this question: As I understand it, this safe working load is what its name implies, namely, a limitation on the recommended load to which a member of the gear or unit of the gear should be subjected so as to afford a maximum safety tolerance or cushion.

The Witness: Yes, in order to take—also take into account deficiencies, things of that kind, which might occur.

The Court: If you have a given breaking strength of a wire and you have computed the safe working load of that wire as one-fifth of that breaking strength, if by reason of the condition of the wire the breaking strength is reduced, is the safe working load proportionately reduced? Do you understand my question?

The Witness: I do, your Honor, and of course, there again it is from a practical aspect. If the breaking strength is substantially reduced due to wear or due to other factors, obviously the same working load has to be reduced.

I mean, it would be inconceivable to think otherwise, that if the wire had deteriorated to the extent that the breaking strain has been weakened, it would be foolhardy to continue the original one-fifth of sound wire breaking strain. So I can only—that is why I could not answer this other question from a practical standpoint. You have to take that into account.

In the work which I do I examine a wire which is worn and I will determine the length of time that it has got to be

watched, or I might bring out the fact that we have lost part of our factor of safety and we have got to be aware of that.

The Court: In other words, there must be that difference at all times for the purpose of safety considerations between [fol. 99] the existing breaking load due to the then condition of the wire and the rated safety safe working load which you would apply to it, is that correct?

The Witness: Yes, your Honor. Picking up an expensive case, putting it aboard a ship, and you have a sling which has been around for three or four months and shows wear, it is not defective but we want to get the full factor safety out of new wire breaking strain, so I would recommend to put a new sling on.

The Court: So as to give to the particular item of cargo the full rated safety load.

The Witness: That is correct.

The Court: You may pursue the matter from there.

Q. Mr. Byrne, you said that if the breaking strain was reduced substantially then the safe working load would diminish?

A. Yes.

Q. And is there any point at which you feel that the safe working load would diminish if the breaking strength diminished?

A. I think it is a constant and continuing problem.

Q. If the breaking strain of the rope diminished say ten per cent, would you consider that a substantial diminution?

A. I would. I would start getting very wary of the wire.

Q. Would you reject the wire?

A. I might.

Q. But that would depend on other factors, would it not, whether you would reject it or not?

A. Yes, that is why it is a difficult thing to discuss.

Q. What are the other factors?

Mr. Monigan: I do not think the witness finished.

The Court: Did you finish?

[fol. 100] Q. What are these other factors?

A. The general appearance of the wire, whether or not it appears to be true in formation, whether it is dried out it shows any sign of corrosion, if it has any wires cut, if fraying starts, things of that kind.

Q. If those conditions do not exist then you still would use that wire?

A. Yes.

Q. And even though the breaking load has been reduced, isn't that right?

Mr. Monigan: It is argumentative. I object to it.

The Court: Mr. Cichanowicz has a certain way of speaking, and I realize that, so I am going to overrule your objection. You see, you make statements, Mr. Cichanowicz, but I realize that it is your method of putting a question. Try to frame your question in a purely interrogatory form and avoid statements.

Q. In other words, under those circumstances you would still keep the wire even though the breaking strain has been reduced?

The Court: Or would you under those circumstances—put it that way.

The Witness: Yes, depending upon how extensive the damage, let us say, or the wear is. If it was not bad, then you might say—identify it, give warning that this is starting to go, beware of it. And in my opinion from the work that I do as a safety man, I am not held to any exact safe working load.

I would take into account the condition of the wire.

. . . . . .

[fol. 101]

Claimant's Supplemental Appendix in Nos. 12,138, 12,139 and 12,140—Filed June 29, 1957

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JOHN H. CRUMADY, Libellant-Appellant,

Against

JOACHIM HENDRIK FISSER, Her Engines, Tackle, Apparel, etc. and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER, Respondent-Claimant-Appellee and Appellant,

Against

NACIREMA OPERATING CO., INC., Impleaded Respondent.

TRANSCRIPT OF TESTIMONY (EXCERPTS)

Excerpt from testimony of PETER PETERS, Master of the S. S. Joachim Hendrik Fisser, called as a witness by the claimant.

* * * * * * *

Cross examination,

By Mr. Brass:

Q. Is it safe to use a winch which has a shut-off device when the load reaches six-ton and the topping lift has a safe working capacity of three-ton, and the runner has a safe working capacity of three-ton, and the boom has a safe working capacity of three-ton?

The Court: Do you understand that question? Can you interpret it?

The Interpreter: I can.

All emphasis supplied unless otherwise indicated.

Mr. Cichanowicz: I would like to renew my objection to the characterization of safe working capacity.

The Court: Safe load capacity is your preference?

Mr. Cichanowicz: Safe working load.

Mr. Brass: I will amend the question accordingly.

The Court: Use the word load where he has used the word capacity.

(Last question repeated by the Reporter with amendment.)

The Witness: (In English) There is no prescribed rule that there has to be a cut-off there. It was my idea that this was put in there.

Mr. Brass: If your Honor please, I do not think that answers the question.

[fol. 102] The Court: Is it safe, Captain, to have that combination of that type of winch with that device in conjunction with the topping lift boom and runner of a lower capacity?

The Witness: No, it isn't.

The Court. It is not dangerous?

The Witness: No.

The Court: He used the word "Gerfahrlich" which means dangerous.

Mr. Brass: What was the answer?

The Court: He said it was not dangerous to use that winch in combination with the other gear of the respective capacities which you have mentioned. "Gerfahrlich" means dangerous. He said it was not dangerous, "Neicht Gerfahrlich."

Excerpts from testimony of Robert A. Simons, called as a witness by respondent impleaded.

Direct examination.

By Mr. Monigan:

. . . . . .

Q. Are you familiar with any prescribed standard design of safety factors in the design of ship winches which

are to be used to power cargo runners for the discharge or unloading of cargo on a vessel?

A. Yes.

Q. What has your experience, either theoretical or practical, in that respect been?

Mr. Cichanowicz: I object to the competency of this witness. I don't believe he has been qualified.

The Court: He is just asking now what his experience has been. I take it that is for the purpose for qualifying him.

[fol. 103] Mr. Monigan: It is my hope to.

The Court: Objection overruled.

The Witness: We purchased and designed or made calculations as to what winches were required, what size winch and where to place them on innumerable rigs on various vessels. That is all part of the design. We decided how much pull the winch should have, what type of winch to put in and so forth. I have repaired and taken apart many winches on board ships.

The Court: Electric and steam?

The Witness: *Steam only.*

The Court: *No electric.*

The Witness: *No electric.*

* * * * * * *

Q. Have you had any experience so far as the automatic cut-off device in electric winches is concerned?

A. Yes.

Mr. Cichanowicz: I object to that. This man says he has no experience with electric winches.

The Court: That was my understanding.

Mr. Monigan: I think the witness was misunderstood. I just asked him this question to which he responded yes.

Q. What has been the nature of your experience in respect of automatic cut-offs on electric winches?

A. Well, in the design and surveying on board ship we have had to design rigs with innumerable electric winches, and *I personally have never specified what the cut-off on a winch should be,* but I have learned through experience what they generally set the cut-off on winches at.

[fol. 104] Q. That is electric winches?

A. Yes.

• • • • • • •

Q. What has been your experience so far as the knowledge of the existence of automatic cut-offs in electric winches?

A. Only what I have learned talking to the men that sell winches, the men that design the electrical circuits for winches in the engineering field.

• • • • • • •

Q. Is there a standard practice so far as you know prescribing an automatic cut-off on electric winches?

A. Well, it is generally around fifty per cent overload and the winch cuts out.

Mr. Cichanowicz: I object again. This is just a method of getting around the other.

The Court: *The unfinished answer will be stricken.*

• • • • • • •

Q. What if any is the prescribed standard of percentage of such safe—such automatic cut-off device to the weight which the winch is designed to lift?

A. *I, myself, know of no regulation, since I have not been that closely connected to that part of the winch.* However, from practice in the field——

The Court: I do not like to interrupt you. You have just said that you have not been sufficiently closely related to that part of it.

The Witness: To answer that question.

The Court: Stop there and wait for the next question.

Q. *Is there any—apart from any government regulation —any prescribed standard of design which can be expressed* [fol. 105] *in a percentage of the capacity which the winch is designed to lift for the functioning of the automatic cut-off device of an electric winch?*

A. *I don't know.*

• • • • • • •

Cross examination.

By Mr. Brass:

. . . . . .

Q. *Did I understand you to say that it is not safe practice to have a runner with a safe working load of three-ton, a boom with a safe working load of three-ton, a topping lift with a safe working load of three-ton, and a winch which had a shut-off device of the current at six-ton or better?*

A. *I did not say that.*

Q. What did you say?

A. I said that it is not safe practice to have a rig that was designed for three tons working load and of the winch with a cut-off set at six tons so that you could apply six tons load *to the hoist* before the winch would cut off because that would be doubling the load for which the rig was designed for.

. . . . . .

Excerpts from testimony of WALTER J. BYRNE, called as a witness by respondent impleaded.

. . . . . .

Cross examination.

By Mr. Brass:

. . . . . .

Q. Are you familiar with cut-offs on electric winches?

A. *I am familiar with the end result.*

Q. What do you base your familiarity on with the end result?

Mr. Cichanowicz: I object to that question. It is not responsive.

[fol. 106] The Court: You cannot, Mr. Brass is the only one that can object on that ground. Objection overruled.

The Witness: I don't remember your question.

Q. On what do you base your familiarity with the end result of cut-offs on electric winches?

A. Well, if you have three-ton gear and a three-ton winch and due to cut-offs in back you allow, let us say, a hundred per cent overload to be developed, then I think from my point of view as a safety man you are taking away a governor. You are taking away something which is built in for the protection of the gear and personnel.

. . . . . .

Cross examination.

By Mr. Cichanowicz:

Q. Mr. Byrne, do you know what an overload device is?

Mr. Monigan: *The witness has not offered himself as an electrical engineer. What is an overload device* but—*it depends on what kind of an overload device,* but if the interrogation is directed to the mechanics or the electronics involved in overload devices, I think it is beyond the scope of the direct examination and it is improper recross.

The Court: Well, in the first place, the question is not complete. There are all kinds of overload devices. I think even in the human body there are. What do you mean, on a winch, on an electric winch?

Mr. Cichanowicz: Obviously, he is talking about the end result of an overload device. I am trying to find out what he is talking about.

The Court: You are asking him whether he is familiar with the nature of an overload device on an electric winch, is that it?

Mr. Cichanowicz: That is correct.

[fol. 107] The Court: I will overrule the objection.

The Witness: *I am familiar with it ONLY again from the end result.*

. . . . . .

The Court: I have a point and I am going to make a suggestion to you. If you want to you can ask the witness how the load is fixed, is it built in or is it variable by that manipulation. I do not mean the load, I mean the cut-off point. Go ahead.

Mr. Cichanowicz: I will adopt the question, if I may.

The Court: All right.

The Witness: I always understood it was variable.

The Court: It would be adjusted.

Q. *And that is what you are talking about is the variable adjustable one?*

A. *Yes.*

* * * * * * *

Excerpt from testimony of JOHN JOSEPH SMITH, taken by deposition, which was referred to by trial court in its opinion (Appellant's Appendix 33a).

Q. Now, Mr. Smith, I show you this document which consists of five pages and a blue back which is marked R-42 for identification, and ask you to tell us whether you know what this is.

A. It's the stevedoring contract concluded between Insular Navigation Company on behalf of our principals and Nacirema Stevedoring Company.

Q. Does your signature appear on this document?

A. Yes, it does.

Q. And is this your signature; that is, referring to page——

A. Yes, it is.

Q. —page, which is marked page 4 and appears under Insular Navigation Company.

* * * * * * *

[fol. 108]

IN UNITED STATES DISTRICT COURT

STEVEDORE CONTRACT REFERRED TO BY TRIAL COURT

(Appellant's Appendix 33a)

This agreement, made and entered into this 30th day of December, 1953, between Insular Navigation Company as Owner, Operator, Charterer or Agent, and Nacirema Operating Co., Inc. Contractor, will govern the discharging and/or loading of vessels owned, operated or otherwise controlled by Insular Navigation Company at the Port of

Port Newark, New Jersey effective December 30, 1953 and the Contractor undertakes to faithfully furnish such stevedoring services as may be required upon such vessels as are assigned to the Contractor, at the agreed rates, terms, and conditions specified below:

DISCHARGING

285,000 Board Feet Nicaraguan Pine from m.v. "Joachaim Hendrik Fisser" scheduled to arrive Port Newark January 2.

Rate: $4.75 Per thousand BM if stowed fore and aft.

Rate: $5.75 Per thousand BM if stowed crisscrossed.

Contractor agrees to furnish service of delivery clerk during discharge of vessel at actual cost plus 10% for overhead and supervision.

1. TYPE OF VESSELS: The stevedoring rates specified in this agreement apply to cargo vessels including those vessels with minimum passenger accommodations.

2. COMMODITY RATE INCLUSIONS: As part of the foregoing specified rates, the Contractor agrees to include in the commodity rates the following described services:

[fol. 109] a. Transport Contractor's gear and equipment to and from the pier where the vessel is berthed, excepting locations that are inaccessible to motor trucks.

b. Provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor and dock crane operators, also foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work.

c. Adjust rigging of booms and guys, etc., at hatches where work of discharging and/or loading will be conducted and unrigging when completed, also removing and replacing beams and hatch covers.

d. Discharge cargo from or load cargo into vessel's holds, tween decks, on deck, shelter or bridge spaces,

deep tanks, cargo lockers and lazarettes, also temporary bunker spaces, but excluding fore and aft peaks and bilges.

e. Shift gangs as required between inshore and offshore, also from lower to upper floor (or vice versa) on double deck piers. Shift lighters into working position after they have been placed alongside vessel, when this can be done without tugs.

f. Sort (by longshoremen) and stack cargo man high on pier upon discharge of vessel or break down cargo from man high on pier upon loading of vessel.

g. Perform such long trucking as required within limits of pier where vessel is berthed—limited to the section occupied by the vessel, should the pier have multiple sections.

[fol. 110] h. Load and lay dunnage boards (except freighted dunnage lumber) as required during loading for proper stowage of cargo.

i. Work two gangs simultaneously in hatches when required and when practical to do so, provided necessary additional booms, falls and winches are supplied by vessel or from shore facilities.

3. Extra Labor Services: When required to supply extra labor, the Contractor will render its charges therefor upon the basis of the labor cost incurred plus 10% and insurance at 15½% for the following described services:

a. Handling ship's lines and gangways.

b. Cleaning ship's holds.

c. Discharging excess dunnage or debris.

d. Tiering cargo on pier above man high upon discharge of vessel or breaking down cargo on pier to man high upon loading of vessel.

e. Loading or discharging ship's stores, material or equipment, mail, baggage, specie, bullion, livestock, animals, live poultry and birds.

f. Carpenter or coopering work of any nature.

g. Handling and placing flooring or timbers for heavy lifts or for use by carpenters.

h. Services of Harbormaster for the berthing and unberthing of lighters.

i. Lashing and shoring cargo.

j. Bolting and unbolting tank lids.

[fol. 111] k. Battening down hatches when called upon to do so upon completion of the vessel.

l. Rigging and unrigging heavy lift booms.

m. Supplying extra labor for any other services when authorized.

4. Rigging/Unrigging Hatch Tents: When required to use hatch tents, the Contractor will charge $20.00 per tent to represent the initial rigging and final unrigging combined; and no charge will be made for intermediate rigging or unrigging of the tent during the working of the vessel.

5. Income from Handling Lighters and Cars: The Contractor shall collect and retain its customary charges for labor services in connection with the loading and unloading of railroad cars, lighters, barges and scows.

6. Equipment: The ship is to supply booms, adequate winches, in good order and with sufficient steam or current for their efficient operation; blocks, topping lifts, guys; wire or rope falls of sufficient length and strength, hatch tents, lights for night work; tugs; derricks or cranes for such heavy lifts as exceed the capacity of the ship's gear, and cranes in the absence of ship's winches. The ship is also to supply dunnage, paper and all material for shoring and lashing cargo as well as grain bags and separation cloths.

The Contractor is to supply all other cargo handling gear and equipment, such as hooks, pendants, save-alls,

nets, trays, bridle chains and slings (except slings for heavy lifts when hoisted by heavy lift floating or shore derrick) also hand trucks, mechanical trucks or tractors, [fol. 112] also dock tractor cranes as needed for efficient stevedoring work.

7. INSURANCE: The Contractor agrees to carry and include in the rates herein specified, Workmen's Compensation Insurance for the unlimited protection of its employees under State and Federal Laws, also Public Liability Insurance for the protection of third parties who have suffered, or alleged to have suffered death or bodily injuries thru the acts of the Contractors' Employees, such Public Liability Insurance to be in the amount of $50,000 for bodily injury or death of one person, and $150,000 for death or injury to more than one person in a single accident.

The rates specified herein also include Social Security Taxes and Unemployment Insurance as presently payable by the Contractor. Whenever actual labor wages are to be charged for by the Contractor under this agreement, the Social Security Taxes and Unemployment Insurance incurred thereon shall be added to charges for Workmen's Compensation and Public Liability Insurances, and all such charges shall be termed "Insurance".

8. RESPONSIBILITY FOR DAMAGE OR LOSS: The Contractor will be responsible for damage to the ship and its equipment, and for damage to cargo, or loss of cargo overside through its negligence. When such damage occurs to ship or its equipment, or where loss or damage occurs to cargo by reason of such negligence, the Ship's Officers or other authorized representatives will call this to the attention of the Contractor at time of accident.

Property Damage Insurance in an amount of $1,000,000 with deductible amount of not over $10,000.

[fol. 113] 9. DETENTIONS, WAITING, LAY TIME: Whenever work is interrupted after starting and detentions of not over 20 minutes duration occur, the Contractor will mak

no charge for reimbursement therefor. Should such detention time exceed 20 minutes duration, the Contractor will charge for the full detention time at labor cost plus insurance. When men are employed and unable to work through causes beyond the Contractor's control, or when men are to be paid for a minimum working period in accordance with the wage agreement, the cost of such waiting or idle time will be charged for by the Contractor at labor cost, plus insurance at 15½%.

10. OVERTIME: When overtime hours are worked, the additional wages thereby incurred and paid to all labor and other stevedoring personnel so employed, will be charged for by the Contractor at cost, plus insurance.

In the event that, under any Government Order or final determination by a court of competent jurisdiction, labor is required to be paid wages in excess of the wages paid under the Federal Fair Labor Standards Act as presently interpreted throughout the port, such wages plus insurance and social security and unemployment taxes together with any additional amount other than wages for which the Contractor may be legally liable under the Act, shall be reimbursed to the Contractor by the Owners, Agents, or Charterers at cost.

11. TRAVEL TIME AND TRANSPORTATION: When the Contractor is required to work at locations where travel time is required to be paid the men, in accordance with the wage scale, such travel time will be charged for at cost, plus insurance. When vessels are worked in the stream or [fol. 114] other places where means of transportation for the men are required or meal allowances must be paid in accordance with the wage agreement, any expense so incurred will be charged for at cost.

12. STRIKES, ETC.: In the event of strikes, lockouts, Union disputes or other labor difficulties, the Contractor will, if able to work, do so upon a basis of cost, plus 20% and insurance at 15½% in lieu of rates specified, unless notified by the Owners, Agents or Charterers that no work is to be performed.

13. INCREASE OR DECREASE IN WAGES: All rates specified are based on and subject to the employment of present longshore labor at the wage scale and working conditions existing in the port in the month of September 1953 under the International Longshoreman's Association Agreement. In the event of an increase or decrease in such wage scale or change in the present longshore labor or working conditions, the rates specified herein shall as a consequence be proportionately increased or decreased.

14. REHANDLING OR SHIFTING OF CARGO: The rates specified herein apply to one handling of cargo. When rehandling, resorting or shifting of cargo is necessary through no fault of the Contractor, the time required for such work will be charged for by the Contractor at cost, plus 10% for overhead and gear, plus insurance at 15½%.

15. DAMAGED CARGO: When handling cargo damaged by fire, water, oil, etc., and where such damage causes distress or obnoxious conditions, or in all cases where the men are called upon to handle cargo under distress conditions, the Contractor's charges are to be based on the labor cost in accordance with the International Longshoremen's Association Agreement, plus 20% for overhead, depreciation of gear, and profit, plus insurance at [fol. 115] 15½% in lieu of the rates specified herein together with the cost of the gear destroyed and the cost of the equipment for the protection of the men as may be required.

16. CONDITION OF CARGO: If the condition of the cargo or packages is other than in customary good order, thereby delaying prompt handling, special arrangements shall be agreed upon in lieu of the rates herein specified.

17. AMMUNITION AND EXPLOSIVES: Are not included in this agreement.

18. ACTS OF GOD, WAR, ETC.: No liability shall attach to the Contractor, if the terms of this agreement cannot

be performed, due to the Acts of God, War, Governments, Fire, Explosion, or Civil Commotion.

19. This agreement may be terminated, modified or amended upon thirty days' notice by either party, provided, however, that notwithstanding any such termination, the Contractor shall continue to be responsible for the loading or discharging of any cargo which the Contractor is handling on the effective date of such termination. Termination of this agreement shall not affect or relieve either party of any liability or obligation that may have accrued, prior thereto.

20. This agreement does not include any services of clerks or checkers.

Insular Navigation Company, Owner/Operator/ Charterer/Agent, By: J. J. Smith.

Nacirema Operating Co., Inc., Contractor, By Andrew G. Dantzler, Vice Pres.

[fol. 116]

Supplemental Appendix of the Respondent-Impleaded Appellant, No. 12,140 and Appellee in Nos. 12,138, 12,139—Filed July 3, 1957

In United States District Court
For the District of New Jersey

John H. Crumady, Libellant-Appellant,

against

Joachim Hendrik Fisser, Her engines, tackle, apparel, etc. and Joachim Hendrik Fisser and/or Hendrik Fisser, Respondent-Claimant-Appellee and Appellant,

against

Naciremа Operating Co., Inc., Impleaded Respondent Appellant and Appellee.

Transcript of Testimony (Excerpts)

Colloquy

Mr. Cichanowicz: I am only offering this, and the contract speaks for itself. Whether it is between the ship-owner or the charterer, I think the contract indicates that.

Mr. Monigan: My objection is directed to the competency of the proffered paper.

The Court: You have no objection to its authenticity?

Mr. Monigan: No, your Honor.

The Court: I would be ruling in a vacuum unless I knew what the document contained. If you want to show it to me I will endeavor to make a ruling upon the present objection which goes to its competency.

Mr. Monigan: Quite so, your Honor, it appears on the first page of the agreement which I think perhaps should be

designated by an identification number so the record will reveal the matter which we are talking about.

It is between Insular Navigation Company and Nacirema Operating Company, it being a contract in writing and it cannot possibly bind anyone other than those who are parties thereto; that so far as the respondent-impleaded is concerned, the agreement is not made with any parties to the present action and therefore it is not competent to bind Nacirema in respect of the action between the Crumady, libelant, and the vessel, respondent.

The Court: There is no question, is there, Mr. Monigan, but that Nacirema Operating Company, Inc., is a party to this document?

Mr. Monigan: No question, your Honor.

The Court: And the other party seems to be Insular Navigation Company in its capacity as owner, operator, charterer or agent.

Mr. Monigan: That is so. The reason that the matter becomes of concern at this stage of the proceedings, is that I assume counsel for the vessel is offering this document in order to avail themselves of the doctrine of those cases which concern themselves with an alleged breach of a stevedoring contract between a vessel and a stevedore.

[fol. 117] This contract which has been proffered by counsel for the vessel manifestly is not a contract between the vessel and the stevedoring company. There has been some authority in the very few cases in which this matter has come before the court, as your Honor knows, it is one of relatively recent origin under the *Ryan Stevedore* case in which there being no indemnity, that is no written indemnity for a loss such as the libelant sustained in the present matter, the only relevancy or competency of the matter is because of an alleged breach of a contract to stevedore.

Now, there was in the *Ryan* case, of course, a direct contract between the vessel and the stevedore and it was upon the implied warranty akin to that which was under the Sales Act in which the court in the *Ryan* case permitted an action by the vessel over the cause of a breach of a warranty.

Now, the situation in respect to the analogy of breach of warranty which was applied by the Court in the *Ryan* case would preclude the vessel, which is not a party to this con-

tract, from asserting any breach of warranty because of the absence of privity of contract.

In the writing itself there is no suggestion that the contract was made for the benefit of the vessel and indeed the only case which I have been able to discover in which a contract such as this which is proffered by counsel was offered in evidence was an attempt to justify on the third party beneficiary theory and that was denied by the court. It was in the District of California.

We also have one in our own district which is not a stevedoring contract but it suggests the general rule which is applicable to such contracts, that in order that there be a cause of action possible under the contract there must be a clearly intended purpose on the part of both contracting parties to create a benefit in another person.

Now, the case to which I have reference in the Southern District of California, is 72 Fed. Supp. 574, at 588. There was a contract between the—well, let us put it this way: The United States contracted with a shipyard to build a [fol. 118] vessel. The vessel was built. It was under lend-lease to the Ministry of Transport of the United Kingdom. The United States made a contract with the stevedoring company to load the vessel which was to go to the Far East. A longshoreman was injured aboard the vessel and this matter of liability of the stevedores' employer was brought before the court. It was a complicated case because of the sovereign immunity and diplomatic immunity and so on, but so far as here pertinent the court's opinion on page 588 of 72 Fed. Supp. says that that contract between the United States and the stevedoring company was not a contract for the benefit of the third party, so that it would inure to the benefit of the Ministry of Transport of the United Kingdom.

I believe that the analogy to the present matter is quite evident.

The second case to which I had reference was the Isbrandtsen Line against Local 1291. That is the Court of Appeals in the Third Circuit, 204 Fed. (2d) 495. That was not a stevedoring contract in the same sense that we are discussing it here, it was a cause of action which was sought to be alleged by the vessel because of delay in the loading of the vessel.

The Court: Was there demurrage involved?

Mr. Monigan: I believe so, and the charterer of the vessel had made the contract with the stevedores and the Court of Appeals said that that contract was not one for the benefit of the vessel, and hence, whatever undertakings the stevedore made—stevedores made with the charterer were not such as to benefit the vessel.

For those reasons I believe that the proffer of the paper writing bearing date December 30, 1953, between Insular Navigation and Nacirema Operating Company is not admissible in the present matter since Insular Navigation is not a party to the action, the only basis for the liability asserted against the respondent-impleaded must be that which the vessel itself asserts or its owner, and neither is a party to the contract proffered.

[fol. 119] The Court: What have you to say to the objection of counsel on the grounds stated therefor, Mr. Cichanowicz?

Mr. Cichanowicz: I have very little to say, that the offer is being made on the theory that the shipowner was a third part beneficiary of this contract. There was no contention being made that the contract was made directly with the vessel, and I believe that it is evident from the wording of the contract that there was—or that the shipowner was a third party beneficiary. I believe that differs from the situation of the cases mentioned by counsel.

The Court: Let me interrupt you there. The only indication of a possible interest of a concern other than Insular Navigation Company and the vessel is to be found in the characterization of Insular Navigation Company as owner, operator, charterer or agent. *Assuming that the last of those words, agent is the one to be relied on, does it indicate—does the document indicate anywhere for whom Insular Navigation Company was acting as agent in entering into the contract.*

Mr. Cichanowicz: No, it does not. We will go one step further and say that in fact, I believe that Captain Jacobson testified that they made it as agent for the charterer. I mean, I will make that statement on the record. (Italics supplied.)

The Court: Entirely apart from that what is the pur-

pose of your offer? What do you want to show by this document?

Mr. Cichanowicz: Primarily to show what the obligation of the stevedore was under the contract, and also to show the fact that this loading was done according to the footage instead of by hours and things of that nature.

The Court: There is no question in this case that the libelant was an employee of Nacirema?

Mr. Cichanowicz: No.

The Court: There is no question in this case that Nacirema Stevedoring contractor was employed by someone to unload the vessel?

[fol. 120] Mr. Cichanowicz: No, there is no question.

The Court: I do not see from a cursory examination of the document anything within it which would appear to be relevant, entirely apart from the basis of the pending objection, there is no undertaking, as I read it, on the part of Nacirema to handle cargo in any particular manner except to furnish slings and certain equipment, the major equipment to be used is expressly provided to be furnished by the vessel, and although there are four characterizations of the party of the first part any one of which might be selected, there is nothing within the four corners of the document to indicate that the Insular Navigation Company was acting either for the vessel or for the vessel's owner, since I understand that the owner of the vessel is Joachim Hendrik Fisser, is that correct?

Mr. Monigan: Corporation, yes.

The Court: I will sustain the objection to the offer. The offer may be marked for identification so that it may be referred to in any subsequent proceeding as the subject of this ruling.

(Contract marked Exhibit R-42 for identification.)

The Court: I might say that if counsel for the vessel can show by additional evidence, and cite controlling authority, the offer may be renewed. But as in the present posture of the proof, I can see no relevancy or competency in the proffered document, and hence my present ruling.

. . . . . .

[fol. 121]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,138
No. 12,139
No. 12,140

JOHN H. CRUMADY, Appellant in No. 12,138,

v.

JOACHIM HENDRIK FISSER, Her Engines, Tackle, Apparel, etc., and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER, Respondents,

v.

NACIREMA OPERATING CO., INC., Impleaded Respondent-Appellant in No. 12,140.

HENDRIK FISSER ARTIEN GESSELSCHAFT, Claimant-Appellant in No. 12,139.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued June 13, 1957

Before Maris, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed September 30, 1957

HASTIE, Circuit Judge.

Proceeding in rem against the ship Joachim Hendrik Fisser, the libellant Crumady has sued in admiralty to hold the ship and its owners responsible for personal injuries [fol. 122] suffered by him while working on the ship as a stevedore employed by Nacirema Operating Co. in the unloading of the vessel at a berth in Port Newark, New Jersey.

The respondent impleaded libellant's employer, Nacirema Operating Co., seeking thereby to obtain indemnification for any loss it might suffer through this suit.

After full hearing the court held the ship liable, ruling that one factor which contributed to the accident was the unseaworthiness of certain equipment of the ship. The court also allowed the ship to recover over against Nacirema, the party whose negligence, in the court's view, was the "sole, active or primary cause" of the accident.

Each of the parties has appealed. The ship challenges the ruling as to unseaworthiness. Nacirema claims that in any event there was no basis for holding it to indemnify the ship. The libellant complains that the amount of the award was erroneously determined and grossly inadequate.

We consider first the way the issue of unseaworthiness arose and was determined. The libel itself asserted a claim in admiralty for injury caused by the negligence of a ship and its owners, and nothing else.[1] There was no claim that unseaworthiness caused the accident or even that any unseaworthy condition existed. However, discussion at a pre-trial conference seems to have led the court to conclude that libellant's contentions included a claim predicated upon unseaworthiness. In any event, the transcript of the trial judge's statement at the conclusion of the pre-trial conference shows that he undertook to frame the issues, saying, apparently with the acquiescence of the parties, that the libellant "contends in effect that the injuries complained of resulted from the unseaworthiness of the vessel. . . ." In addition, the court made it clear that the [fol. 123] structure alleged to have been unseaworthy was a cable or topping-lift which parted causing a boom which it supported to fall upon the libellant. Thereafter, libellant's proof was directed at establishing that the topping-lift was worn and defective and, for that reason, parted under

[1] Since *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, it has been authoritatively established, if not unanimously agreed, that admiralty affords an injured workman so situated as libellant two distinct causes against the ship, one for negligent injury and the other for injury caused by the unseaworthiness of the vessel, although, of course, there can be only one recovery of damages for the same personal injuries.

the strain of lifting cargo which sound gear would have withstood.

The evidence relevant to this theory of liability was conflicting and the court, with adequate basis in the record, found as a fact that the topping-lift was not defective but "was adequate and proper for the loads for which the rest of the gear was designed and intended". The court also found quite properly that Nacirema's employees, libellant's fellow stevedores, were negligent in their conduct of the unloading operation. More particularly, attempting to lift long and heavy timber from the hold they permitted the load to catch under the coaming at the margin of the hatch from which it was being removed. In addition, though forbidden to change the position of the head of the boom which the crew of the vessel had placed over the center of the hatch, they had changed the attachment of the preventer and guy which controlled the position of the boom so that the head of the boom was no longer over any part of the hatch but had been moved a distance to port of the hatch opening. The excessive and abnormal strain which this incorrect procedure imposed upon the topping-lift will be discussed later. It suffices to point out now that the court with justification attributed the accident primarily to this negligence of Nacirema.

But having thus eliminated the basis of unseaworthiness formulated at pre-trial, the court found and adopted a new theory of the ship's unseaworthiness and responsibility which libellant had not pleaded and, so far as we can determine, had not attempted to establish in his proof. An understanding of the court's reasoning requires the consideration of additional circumstances not heretofore mentioned.

[fol. 124] The gear being used at the time of the accident was rated and approved to lift a load of three tons or less. In the actual unloading operation a cable, called a cargo runner, was attached to the object to be lifted from the hold. This runner extended upward over a block at the end of a boom high above the hold and thence to and around a winch powered by an electric motor. The electrical equipment in this case included an automatic circuit breaker which stopped the flow of power to the winch whenever the

current built up beyond the amperage for which the device had been set. Witnesses were asked to relate the cut off amperage to the strain imposed upon the winch by the load it was lifting. The witnesses agreed that the cut off was set so that if the motor should be required to overcome a strain on the cargo runner somewhat in excess of six tons the current would quickly build up to the setting of the circuit breaker and the motor would automatically cut off. In this case, the motor did cut off, apparently just before the topping-lift parted.

The libellant seems to have introduced testimony about the cut off device in an effort to show that the power was cut off before the gear was subjected to any greater strain than it should have been able to withstand. But in analyzing this testimony, much of which was a rather confused discussion of "load" and "torque" and other electrical concepts induced by questions addressed to the witnesses as though the concepts were mechanical rather than electrical, the court concluded that it was unsafe practice, rendering the gear unseaworthy, to have the cut off set so that the circuit would not be broken until the tension in the cargo runner should exceed six tons. In other words, the court thought the rating of the gear to handle a cargo load of three tons indicated that it was unsafe to have the circuit breaker so set that the cargo runner might be subjected to a six ton strain.

While the court's reasoning was in accord with an opinion expressed by a witness, the application of mathematics to [fol. 125] the undisputed facts requires the rejection of that opinion and the acceptance of other testimony, based in part upon a Coast Guard standard for the setting of such a control, indicating that the setting of the cut off device was entirely safe and proper. The testimony was clear and undisputed that hoisting gear of the kind in suit is rated to lift a load not more than one-fifth of the strength of the cable itself. Thus, gear rated to handle a three ton load utilizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage. Indeed, as the testimony shows and the laws of physics teach, inertia,

friction and the normal circumstances of operation make it necessary that substantially more than a three ton strain be imposed upon the gear before a three ton load can be lifted. Thus, the electrical equipment must and safely can impose a strain on the runner much greater than the weight to be lifted.

This was demonstrated by what happened in the present case. A strain of six tons or more on the cargo runner had no effect on that cable. The circuit breaker cut off the power at that point, while the strain was still well within the capacity of the cable. By the same token, if this operation had been conducted normally and properly the strain on the topping-lift would have been well within its capacity when the circuit breaker intervened. For this part of the gear also was rated to handle three tons of cargo and thus could withstand a fifteen ton strain.

The decisive fact, as the court found it, was that the employees of Nacirema had so changed the position of the head of the boom as to seriously distort the normal composition of forces which is presented by a straight lifting operation. It was for this reason that the topping-lift was subjected to an enormous, abnormal and unanticipated strain. On the basis of expert testimony the court found as [fol. 126] a fact that this strain was somewhere between seventeen and twenty-one tons, three or four times the strain then being imposed on the cargo runner and the winch.

This analysis leads to two conclusions. It was a proper finding that the negligence of the stevedores was "the sole active or primary cause" of the parting of the gear. But we think it is equally clear that the court erred in the next step of its reasoning, that this negligence of Nacirema "brought into play the unseaworthy condition of the vessel". The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose.[2] Applied to the present facts, this means that the

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[2] *The Silvia*, 1898, 171 U.S. 462; *Doucette v. Vincent*, 1st Cir. 1952, 194 F.2d 834; see *Berti v. Compagnie de Navigation Cyprien Fabre*, 2d Cir. 1954, 213 F.2d 397, 400. *Cf. The Daisy*, 9th Cir. 1922, 282 Fed. 261.

setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventuality was reasonably to be feared or anticipated. Thus, the gear was not proved to have been unseaworthy, neither was the setting of the cut off device established as a legal cause of the accident which occurred.

A decree should have been and now must be entered denying the libellant recovery. In these circumstances we do not reach the substantial question raised by the impleaded respondent whether there would have been legal basis for making it an indemnitor, had the ship's liability been sustained.

The judgment will be reversed.

[fol. 127] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12138, 12139, 12140

JOHN H. CRUMADY, Appellant in No. 12,138,

vs.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc., and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER,

vs.

NACIREMA OPERATING CO., INC., Appellant in No. 12,140.

HENDRIK FISSER AKTIEN GESSELSCHAFT,
Claimant-Appellant in No. 12,139.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: Maris, Staley and Hastie, Circuit Judges.

JUDGMENT—September 30, 1957

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest: Ida O. Creskoff, Clerk.

[fol. 128] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,138 and 12,139

JOHN H. CRUMADY (Libellant), Appellant in No. 12,138,

v.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc. and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER (Respondent-Claimant), Appellant in No. 12,139,

v.

NACIREMA OPERATING CO., INC. (Impleaded Respondent).

LIBELLANT'S PETITION FOR REHEARING—Filed October 15, 1957

[fol. 129] TABLE OF CONTENTS TO LIBELLANT'S PETITION FOR REHEARING

[fol. 130] TABLE OF CASES CITED

[fol. 131] PETITION FOR REHEARING

Libellant prays your Honorable Court for a rehearing in the within matter for the following reasons:

The decision of this court is in direct conflict with the decisions of the Supreme Court of the United States in *Petterson* v. *Alaska S.S. Co.*, 205 F.2d 478, affirmed per curiam 347 U.S. 396; *Rogers* v. *United States Lines*, 205 F.2d 57, reversed 347 U.S. 984; and *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336.

[fol. 132] In addition, the factual finding which this court adopted in overruling the court below is also clearly erroneous.

PRELIMINARY STATEMENT

The court below found that the vessel was unseaworthy because the cut-off device in the winch was set to shut off the power only after the load being lifted was more than twice the safe working load of the cables. The court below also held that the boom was rigged by the stevedores at such a dangerous angle that it imposed an excessive strain upon the cable, and it was this factor which brought into play the unseaworthy condition of the winch. The ship was, therefore, held liable to the injured longshoreman because of the unseaworthy winch, and the ship was allowed indemnity over against Nacirema, the stevedoring company, because of the improper rigging of the boom.

This court reversed the finding that the winch was unseaworthy upon the ground that the lower court's opinion in this respect was "mathematically" incorrect, and held that the sole cause of the accident was the dangerous condition of the boom as it had been rigged by Nacirema.

It is here contended that this court erred in absolving the ship, because even if the factual premise be correct the ship was responsible for the unseaworthy condition of the boom, regardless of whether it was rigged by the ship's crew [fol. 133] or the stevedore. Moreover, implicit in the factual premise of this court is the conclusion that Nacirema, the stevedore, was incompetent to perform the work of rigging the boom and this incompetency also rendered the vessel unseaworthy.

The Vessel Should Have Been Held Liable Regardless of Whether the Unsafe Condition of the Boom Was Rigged by the Ship's Crew or the Stevedore

The Supreme Court of the United States, in a series of decisions starting with the case of *Seas Shipping Company* v. *Sieracki,* 328 U.S.-85, held that the longshoremen were "seamen," and entitled to the benefit of the warranty of seaworthiness, as though they were members of the ship's crew. In *Pope and Talbot* v. *Hawn,* 346 U.S. 406, the court reaffirmed its holding in Sieracki and pointed out that the longshoremen were vested with the same rights against the vessel as members of the crew, with the exception of the right to maintenance and cure.

In *Petterson* v. *Alaska S.S. Co.,* supra, a longshoreman was injured because of an unseaworthy condition created by a defective block which had been brought on board and rigged by the stevedores. The Court of Appeals for the Ninth Circuit held that it made no difference that it was brought on board and rigged by the longshoremen. It was sufficient that it was used in connection with the ship's business, and if it were, in fact, unsafe then the vessel was [fol. 134] unseaworthy and liable for injury to the longshoremen. The Supreme Court affirmed per curiam upon the authority of its decisions in the Sieracki and Hawn cases.

In *Rogers* v. *United States Lines,* supra, the Supreme Court adhered to the same rule upon a set of facts even more analogous to those at bar. There the stevedores were engaged in unloading ore from the holds of the vessel onto railroad cars on the pier alongside the vessel. The booms and other tackle were so set that the cable from the winch, which had been furnished by the stevedore, was not long enough to extend into the wings of the vessel where the ore tubs had to be placed in the unloading operation. As the tub was lowered down and swung in toward the wing of the hold, the cable ran out its full length off the drum of the winch and then started to rewind as the drum kept revolving. As a result, the ore tub suddenly swung back across the hold and struck one of the longshoremen. The Court of Appeals held that the ship could not be held liable because

the unsafe condition resulted from the insufficient length of wire which had been rigged by the stevedore. The opinion of the Court of Appeals at this point shows (pp. 57-58):

> "Admittedly then, the alleged unseaworthy condition was not created by the ship. The runner was owned, produced and fastened to the winch by Lavino, which was in charge of and performing the unloading operation. And there is no indication that the ship sanctioned its use or even knew of its existence. The statement [fol. 135] that the vessel adopted the runner as an appurtenance is simply not justified by the record. In accordance with the well accepted practice the discharge of the cargo had been turned over to Lavino Company, an experienced master stevedore concern. The latter had taken the assignment and proceeded to carry it out. In the course of so doing and for its purposes it hooked up one of its own wires and thereafter used it in connection with other rigging. While there is strong evidence of Lavino's negligence through its employees, particularly the winch operator, the resolution of that question is not pertinent to this appeal. Since the wire alone or the manner in which it was handled, or both, caused plaintiff's hurts and since under the facts the presence of that wire cannot be construed as appellee's responsibility this judgment should not, for the reason urged, be disturbed."

This decision of the Court of Appeals was unequivocally *reversed* by the Supreme Court without oral argument in a per curiam decision (347 U.S. 984, 98 L. Ed. 1120).

These decisions of the Supreme Court, starting with the Sieracki case, decisively demonstrate that the ship is liable for injury to a longshoreman due to any unsafe condition [fol. 136] on the vessel, and it makes no difference whether the unsafe condition is created by, or even brought on board by the stevedores. In this respect, the longshoremen are in precisely the same position as the members of the crew.

The shipowner's duty to all seamen, including longshoremen, as well as members of the crew, is to supply and

maintain a seaworthy vessel, and this duty is "neither limited by conceptions of negligence nor contractual in character," and "is peculiarly and exclusively the obligation of the owner . . . *one he cannot delegate.*" *Seas Shipping Co. v. Sieracki*, supra, at U.S. pp. 94-95. The shipowner's duty is to "*supply and keep in order* the proper appliances appurtenant to the ship" *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, at p. 104; *The Osceola*, 189 U.S. 158, 175.

Libellant's cause of action is based upon the fundamental proposition that it is the shipowner's *absolute and nondelegable* obligation to provide the longshoremen engaged in the ship's service with a safe and seaworthy vessel and equipment and that, consequently, *the shipowner is not free to nullify its responsibility for the breach of this duty by a parcelling out of its operations to intermediary employers whose sole business is to temporarily take over portions of the ship's work while in port, or by other devices which would strip the men performing its services of their historic protection.* Translated into the context of the case at bar, this means that irrespective of the convenience or [fol. 137] desires of the shipowner, the maritime law fastens upon him the responsibility for any defect, insufficiency or unsafe condition of the ship's gear, and that this responsibility may not be avoided by the commercially expedient device of parcelling out to shoreside contractors the various phases of the ship's business in port. Whatever concurrent duty the law may impose upon these intermediary employers and whatever concurrent fault may be attributable to them, the shipowner's responsibilty remains constant and unaffected. This proposition is spelled out in so many words by the Supreme Court in its landmark decision in *Seas Shipping Company v. Sieracki*, supra, which was the culmination of a long and troubled history in the field of litigation involving the rights of longshoremen against vessels by whom they were not employed but for whom they were performing work essential (sic) the vessel's enterprise, work which was formerly done by seamen who were members of the crew. Without reviewing it in detail here, it suffices to say that its history is punctuated by numerous attempts on the part of the shipowners to nullify and restrict the scope of their liability, and to shift to others

their traditional obligations. These attempts have been marked in the main by restrictive and artificial distinctions: "refinements" which, as the Supreme Court aptly characterized it in a related connection, would "cut the heart from a protection to which they are wholly foreign in aim and effect." *Aguilar* v. *Standard Oil Company*, 318 U.S. 724 at 736. The Supreme Court in Sieracki pointed out (footnote 16, U.S. p. 98): "It is in relation to liability for personal injuries or death arising in the course of his employment on the ship that the policy of our law has been [fol. 138] most favorable to the stevedore's claims." This policy, rooted in the practical necessities of the maritime trade, is based in great measure upon the realistic recognition that except for the technical aspects of the relationship brought by the modern specialization in the maritime industry, *the harborworker, though intermediately employed, is in truth and fact a servant of the ship upon which he performs his labors, and he is, therefore, entitled to the same protection as the members of the crew.*

The application of these established principles to the case at bar requires a holding in favor of libellant on the basis of this court's findings of fact. The very fact that the boom was rigged in such a fashion as to impose an abnormal and excessive strain upon the topping lift is, of itself, a finding that the vessel was unseaworthy. The shipowner's responsibility to furnish a safe place "*continues through any hazard created by longshoremen in loading the cargo . . .*" *Shields* v. *United States*, 175 F.2d 743. It is immaterial that the boom was improperly set by Nacirema. It is sufficient that it was in fact an unsafe condition and it follows from this fact alone that the ship must bear the responsibility for injuries to libellant resulting from that condition.

The Incompetence of the Stevedore Rendered the Vessel Unseaworthy

There is yet another aspect to this court's finding of fact. Implicit in that finding is the conclusion that Nacirema did not know how to rig the booms and was either unaware of or indifferent to the danger incident to the manner in which the boom was rigged. In either event, Nacirema's

[fol. 139] superintendents on the vessel did not measure up to the required standard as outlined in *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L. Ed. 354, i.e. that they were not "equal in disposition and seamanship to the ordinary men in the calling." In the Boudoin case, one member of the crew savagely assaulted and injured another crewman. The Supreme Court there held that the warranty of seaworthiness contemplated not only a safe and staunch vessel and appurtenances, but it required also that the vessel be manned by a complement capable of meeting the contingencies of the voyage. In relating the personnel on the vessel to the warranty of seaworthiness, the court said at pages 338-340:

> "We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other. A seaman with a proclivity for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect . . . If the seaman has a savage and vicious nature, then the ship becomes a perilous place. A vessel bursting at the seams might well be a safer place than one with a homicidal maniac as a crew member.
>
> "We do not intimate that Gonzales is a maniac nor that that extreme need be reached before liability for unseaworthiness arises. We do think that there was sufficient evidence to justify the District Court in hold-[fol. 140] ing that Gonzales crossed the line, that he had such savage disposition *as to endanger the others who worked on the ship.* We think the District Court was justified in concluding that Gonzales was not equal in disposition to the ordinary men of that calling and that the crew with Gonzales as a member was not competent to meet the contingencies of the voyage. We conclude that there was evidence to support the cause of action for breach of the warranty of seaworthiness." (Emphasis supplied.)

Since the longshoremen, in fact, become servants of the ship and their services are an essential part of the ship's business, they are as much a part of the ship's personnel

as are the crewmen. It would be entirely inconsistent to say that a ship becomes unseaworthy because of a defective piece of equipment brought on board by the longshoremen, but not if the longshoremen themselves were defective. As the Supreme Court said in Boudoin, there is "no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other."

In *West* v. *United States, et al.*, 246 F.2d 443, a longshoreman was engaged in repairing and fitting the vessel for sea when he was injured by a plug which fell from above in the engine room. It was contended on one hand that the plug was dropped by a fellow longshoreman, and on the other hand that it came out of an overhead pipe when the water pressure was turned on. Because the lower court had failed to make a decisive finding of fact in this respect, [fol. 141] the case was remanded back to the district court for that purpose, and in so doing Judge Goodrich, speaking for this court, said at page 444:

> "If the plug was accidently dropped by a fellow workman of Atlantic, that presents one set of problems. If the fellow workman intentionally dropped it then we have the question involved, perhaps, in Boudoin v. Lykes Bros. S.S. Co., 1955, 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354."

In the case at bar, the stevedore, according to the opinion of the court, rigged the boom in such a dangerous manner as to make inevitable the breaking of the topping lift upon the application of a strain within the contemplation of the ship's work. It follows from the court's finding that the stevedore was incompetent because it did not know the danger inherent in so rigging the boom, and in this respect it was not equal in *seamanship* to ordinary men in the calling. In either event, the vessel must be deemed unseaworthy.[1]

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[1] The incompetence of the stevedore was pleaded in par. 8 of the libel: "in that claimants and respondents allowed and permitted incompetent help and superintendents to operate and direct the boom and equipment on said ship" (App. 8a-9a).

This court should, therefore, have affirmed the judgment in favor of libellant against the vessel, notwithstanding this court's rejection of the lower court's finding that the winch was unseaworthy.

[fol. 142] This Court Erred in Overruling the Fact Finding of the Court Below

Apart from the foregoing considerations, it is clear that this court erred in its mathematical calculations in overruling the fact finding of the court below that the cut-off device in the winch was set at an unsafe level and that this was a contributing factor to the accident. This error arose from two incorrect assumptions which this court used in its mathematical computations: (a) that the setting of the cut-off device was in conformity with a Coast Guard standard;[2] and (b) that the topping lift had a capacity of fifteen tons instead of three tons.

The setting of the cut-off device in this case was not in conformity with the Coast Guard regulation, but, on the contrary, it exceeded the allowable limits under that regulation by at least fifty per cent of the safe working load. The regulation provides that the circuit breaker in motors (not winches) of not more than fifty horsepower shall be set at a maximum of 250 per cent of *full-load current* (not of weight of load being lifted). Respondent's expert, Foley, testified that this meant that the circuit breaker would shut off the power in the motor when the weight of the load reached a level of fifty per cent over the rated

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[2] There was no specific Coast Guard regulation introduced or referred to in the evidence. Respondent's witness, Foley, in answer to a question as to what the maritime regulations were regarding the level at which the circuit breaker should be set, stated *250 per cent of full load current* (not of the load being lifted). Only after the argument on this appeal did respondent refer the court to a specific Coast Guard regulation (46 C.F.R. Part 111.45-20(b2)). That regulation does not refer to ships' winches and we have not been able to find any regulation pertaining to ships' winches. Upon inquiry, at the Coast Guard, we were referred to the Maritime Administration which prepares the plans and is responsible for building the ships. Those authorities advised that there are no regulations covering the setting of circuit breakers or cut-off devices relating to the motors in ships' winches.

[fol. 143] capacity of the winch. In this case, he stated, if the circuit breaker had been set at 250 per cent of the full load current, where the rated capacity of the winch was three tons, *a load of* between four and four and one-half tons being lifted by the winch would trip the circuit breaker and shut off the power (R. 1976-1980).

Respondent's witness, Foley, made it very clear that the percentage of overload in the Coast Guard regulation referred to the current coming from the motor and not the weight being lifted (R. 1978). Respondent's Captain Peters, with full knowledge of the technical features of this problem and being especially well qualified regarding the actual setting of the circuit breaker, for he supervised the construction of the ship (R. 737-738), testified that the cut-off device was set to go off when the *load being lifted* was *more than six tons*, and he admitted that it was more than twice the safe working load of the ship's tackle (R. 920, 922-923).

It follows from this testimony that the setting of the circuit breaker was more than fifty per cent above the limit contemplated in the Coast Guard regulation, if that regulation be applicable at all. If the cut-off had been set within the limits of the regulation, it would not have exceeded a load of four and one-half tons. Since it was actually set to lift a load of more than six tons, it was a substantial violation of the regulation, as well as a violation of the proper and standard practice, as the court below found, which was a substantial contributing factor to the accident.

[fol. 144] This court's mathematical computation was also based upon a highly erroneous conception of the strength and capacity of the hoisting gear. The opinion states that the hoisting gear here involved "is rated to lift a load not more than one-fifth of the strength of the cable itself. Thus, gear rated to handle a three-ton load utilizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage." This finding is not only factually incorrect, but it is contrary to

universally recognized principles relating to factors of safety in the manufacture of products.

This court assumed that because the cable here had a factor of safety of five times its rated safe working load, it had a capacity or was capable of hoisting five times that load. That assumption is fallacious because the factor of safety does not mean that it has a capacity of five times the safe working load, but only that the cable would not be expected to *break* until the strain upon it reached five times the safe working load. In the manufacture of all products requiring a factor of safety, the product must be tested to destruction in order to determine the breaking point. This means that before the point of destruction is reached there necessarily must be progressive and irreversible damage done to the product before it reaches the point of breaking. In order to determine the safe working load or capacity of the product, it becomes necessary to go back from the breaking point to a point before the strain begins to impose a progressive and irreversible damage. If the strain on the product were permitted to exceed the [fol. 145] safe working capacity of the product it would mean that every time the product is used it would suffer more damage progressively until it reaches the point where it would fail even though the strain on the last occasion was within normally permisslbe (sic) limits. It is precisely to prevent this progressive damage that the factor of safety is designed to keep the safe working load below the level of progressive permanent damage. While a product may continue to function where the strain exceeds the safe working level but is within the limits of the factor of safety, the product, nevertheless, becomes weaker and, while it may not break on that occasion, a series of such successive strains necessarily weakens the product and successively lowers the factor of safety. The breaking point may thus be reduced to a level well within the supposedly safe working load.

It was, therefore, incorrect to say, as this court did here, that the cable which had a rated safe working capacity of three tons was "adequate to withstand a strain of fifteen tons," and that, therefore, a strain of six tons, or twice the safe working load, "did not in itself create any undue

risk of breakage." The very fact that the manufacturer of the cable designated three tons as the maximum working load for the cable evidences that the manufacturer did not intend a strain of more than three tons to be imposed on the product. Should we assume for the moment that the cable broke while under a strain of six tons, would a suit lie against the manufacturer where the cable expressly was limited to three tons? Suppose the three-ton cable was used repeatedly for a six ton load. Would a cause of action lie against the manufacturer? If it is permissable (sic) to exceed the safe working load at all, why would [fol. 146] it not be permissable (sic) to go to the extreme limit of fifteen tons? The rationale of this court's decision permits exactly that.

It is suggested that in order to lift a load of three tons it is necessary to impose a strain of more then three tons. While this is undoubtedly true, it does not justify putting a strain of more than three tons on a three-ton cable. The answer would appear to be that if a load of three tons is to be lifted and a strain of four and one-half tons is required to lift it, then the cables and other tackle should have a safe working capacity of four and one-half tons and not three tons. Anything less than four and one-half ton cable, under those circumstances, renders the vessel unseaworthy.

Under the circumstances, since the safe working load of the cables was three tons, the cut-off device should have been set so as not to exceed that maximum.

The trial judge was clearly right in holding that the cut-off device was set at an excessive level and that this rendered the vessel unseaworthy.

Even if we accept the testimony of respondent's witnesses that the position of the boom as rigged by Nacirema imposed a strain on the topping lift of three or four times greater than the load being lifted, the accident would, nevertheless, have been avoided if the cut-off had been set at the safe working load of three tons. Had it been so set, the maximum strain on the cable would have been between nine and twelve tons, well within the factor of safety, if [fol. 147] the cable had its full factor of safety. This, of course, may have weakened the cable, but it should not

have broken. The accident is thus traceable to the excessive setting of the cut-off device even on the basis of respondent's calculations.

The decision of the trial judge on the question of the ship's liability to libellant should have been affirmed.

Conclusion

The decision and reasoning of this court bring into play new issues which counsel did not contemplate in the original briefing and argument of the case. Aside of the fact that the decision will have the most serious consequences upon libellant, who is totally and permanently disabled as a result of the accident, the issues raised by this court's opinion will have a tremendous impact upon the admiralty law relating to the liability of the shipowner for unsafe conditions created by the stevedores and for the incompetency of the stevedores. Moreover, this court's interpretation regarding the factor of safety of materials and exceeding the safe working limits of materials will have an equally great impact in all industries including the maritime industry. Before creating such precedents, it is submitted that this court avail itself of the privilege of requiring full arguments of counsel upon the precise issues raised by its decision and opinion which have not heretofore been presented and argued.

[fol. 148] The interests of justice require that a rehearing be granted.

Respectfully submitted,

Abraham E. Freedman, Sidney A. Brass, Counsel for Libellant.

[fol. 149]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,138
No. 12,139
No. 12,140

JOHN H. CRUMADY, Appellant in No. 12,138,

v.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc., and JOACHIM HENDRIK FISSER, and/or HENDRIK FISSER, Respondents,

v.

NACIREMA OPERATING CO., INC., Impleaded Respondent-Appellant in No. 12,140.

HENDRIK FISSER AKTIEN GESSELSCHAFT, Claimant-Appellant in No. 12,139.

ON PETITION FOR REHEARING

Before Biggs, Chief Judge, and Maris, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed December 5, 1957

Per Curiam:

A petition for rehearing is presented for our consideration on a theory of unseaworthiness which seems not to have been advanced in the trial court and has not heretofore been urged on this appeal. We find no such merit in this or any other contention as would warrant a rehearing. Accordingly, the petition for rehearing is denied.

[fol. 150] Biggs, Chief Judge, dissenting.

My brother Hastie's succinct opinion expressing the majority view as to why the accident to Crumady occurred raises an issue which requires rehearing before the court *en banc*. The majority opinion correctly concludes that Crumady was injured because a seaworthy boom, topping lift and tackle were employed to lift cargo from the vessel's hold but because the boom and topping lift were wrongly positioned by the stevedoring crew too great a strain was put on the boom and topping lift causing the topping lift to break.

Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9 Cir. 1953), aff'd *per curiam* 347 U.S. 396 (1954), held that the responsibility of the ship owner was not shifted to the stevedoring crew because that crew brought on board and made use of a defective block which caused Petterson's injuries. The Court of Appeals for the Second Circuit in Grillea v. United States, 232 F. 2d 919 (1956), held that where longshoremen placed a seaworthy, but wrong, hatch-cover over a "pad-eye", and thereafter a longshoreman stepped on the hatch-cover which gave way under him, causing him serious injuries, the ship was liable. In the case at bar, it would appear that a logical and necessary extension of the principles enunciated in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), and in Petterson, would require the holding that the ship was liable for the wrongful positioning of the boom and the topping lift despite the fact that the stevedoring crew, of which Crumady was a member, placed the boom and the topping lift in position. This is a doctrine to the effect that a "seaworthy" round peg placed in a "seaworthy" square hole will render the whole unseaworthy. While it does not appear how long a time elapsed between the positioning of the boom and the topping lift and the occurrence of the accident in the case at bar, it is clear that some time necessarily elapsed.

[fol. 151] For these reasons I conclude that rehearing should be had before the court *en banc*.

[fol. 152] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,138; 12,139

JOHN H. CRUMADY, Appellant in No. 12,138,

vs.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc., and JOACHIM HENDRIK FISSER, and/or HENDRIK FISSER,

vs.

NACIREMA OPERATING CO., INC.
HENDRIK FISSER ARTIEN (sic) GESSELSCHAFT,
Appellant in 12,139.

ORDER DENYING PETITION FOR REHEARING—December 5, 1957

Present: Biggs, Chief Judge, and Maris, Staley and Hastie, Circuit Judges.

After due consideration the petition for rehearing in the above entitled case is hereby denied.

Dated: December 5, 1957

[fol. 153] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 154]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 27, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

May 2, 1958.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

Dated this 27th day of February, 1958.

[fol. 155]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—March 1, 1958

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

May 2, 1958, without thereby affecting the determination of the timeliness of this application.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

Dated this 1st day of March, 1958.

[fol. 156]

SUPREME COURT OF THE UNITED STATES

No. 968, October Term, 1957

JOHN H. CRUMADY, Petitioner,

vs.

"JOACHIM HENDRIK FISSER", her Engines, Tackle, Apparel, etc., JOACHIM HENDRIK FISSER, et al.

ORDER ALLOWING CERTIORARI—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 971 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 157]

SUPREME COURT OF THE UNITED STATES

No. 971, October Term, 1957

"JOACHIM HENDRIK FISSER", her Engines, Tackle, Apparel, etc., Petitioner,

vs.

NACIREMA OPERATING CO., INC.

ORDER ALLOWING CERTIORARI—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 968 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.